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Supreme Court of the United States

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CHARLES C. McCHORD, ETC., - - - - - - - - Appellants,

vs.

LOUISVILLE & NASHVILLE RAILROAD COMPANY, - Appellee.

BRIEF FOR APPELLEE.

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Supreme Court of the United States.

CHARLES C. MCCHORD, ETC., ... *Appellants*,

vs.

THE LOUISVILLE & NASHVILLE RAILROAD CO., *Appellee*.

BRIEF FOR APPELLEE.

I

In addition to our brief on other questions involved in this case, and which apply equally to all the appellees in the several cases now to be heard as one, we submit herewith our argument on the feature peculiar to the Louisville & Nashville Railroad Company.

That Company was organized under and accepted a Charter approved March 5, 1850.

By the 18th section of that Charter it is provided that the President and Board of Directors

"Shall have power to charge for tolls and the transpor-
"tation of persons, merchandise and property of any kind
"whatever transported along said railway **any sum** not
"exceeding the following rates, to-wit: On all goods, mer-
"chandise or property for every one hundred pounds trans-
"ported over twenty miles and under fifty miles, three and
"a half mills for each mile; and for persons, and every
"species of live stock and every description of freight and

"property, they shall charge no greater rate than is author-
"ized to be charged on the railway from Lexington to
"Frankfort."

Turning to the Charter of the last named road, we find the rates prescribed by Section 20, and copying only so much of that section as applies to rates, we find the language is as follows:

"That said Board of Directors shall have power to
"charge for tolls, and the transportation of persons, goods,
"produce, merchandise and property of any kind what-
"soever transported by them along said railway between
"Lexington and the Kentucky River, **any sum** not exceed-
"ing the following rates, to-wit: For transporting any dis-
"tance single packages, weighing less than one hundred
"pounds, twenty-five cents; and at that rate, if such pack-
"ages weigh more than one hundred pounds; for transport-
"ing goods, produce, merchandise or property of any
"kind, not less than three and a half mills, nor more than
"four mills per hundred pounds weight per mile; for
"transporting passengers, not less than three and a half
"cents per mile, nor more than four cents per mile for
"each passenger, with his baggage, not weighing more
"than forty pounds; except upon the article of coal,
"upon which there shall be charged not less than three
"cents on the bushel; but the charge on coal shall at no
"time be fixed at a rate which will not yield a profit on
"its transportation. Live stock, poultry and furniture;
"also feathers, wool, rags and other light, bulky articles,
"weighing not more than sixty-five pounds to the cubic
"foot; also silver and gold bullion, money of all descriptions
"and mails are excepted from the rates herein established;

"and the Board of Directors, or their agents, shall be and "they are hereby authorized to contract specially for "their transportation, upon such terms as the parties "interested may agree upon. Provided, such rates shall "in no case exceed fifteen per cent. over the rates "allowed to be charged for heavy merchandise or produce, "except for gold, silver, bullion, money of all kinds and "mails. The said Board of Directors and their agents "may charge for receiving, forwarding and storing such "articles and packages as may be consigned to them, or "deposited in their warehouses, or with their agents, for "safe keeping, or to be forwarded; and they may estab- "lish by their by-laws rates of storage and other fees for "such services. But they shall make no rule or regula- "tion giving any preference in transportation of goods "or other articles sent from other houses, stores, or "places; nor shall they make any difference in the rates "of charges on goods or other property consigned to "other persons for transportation on said road; but shall, "in all things, receive and receipt for goods and property "of every kind consigned to other persons on the same "terms as if consigned to themselves."

That Charter was approved February 28, 1848, and was amended February 26, 1849, as follows:

"SEC. 1. Be it enacted by the General Assembly "of the Commonwealth of Kentucky, That the minimum "rates for the transportation of persons, goods, produce, "merchandise and property of every kind, established by "the twentieth section of the 'Act to incorporate the "Lexington and Frankfort Railroad Company' except "that upon the article of coal, be and the same are hereby

"abolished, and the Board of Directors of said Company "shall have power to charge for tolls and the transportation "of persons, goods, produce, merchandise and property of "every kind (except coal) any sum they may deem proper, "not exceeding the maximum rates prescribed by the 20th "section."

Section 2 of the amendment of the Charter of appellee, approved March 20, 1851, is as follows:

"SEC. 2. That said Company shall have power and "authority to construct their road from the City of Louis- "ville to any point or place in the direction of Nashville, "Tennessee, and to connect the same with any railroad "extending to Nashville, on such terms and conditions as "the two companies may, from time to time, agree on, for the "through transportation and travel of freight and passen- "gers; and said Company shall have the same power and "authority to construct a branch of said road to the Missis- "sippi River, and any other branch said Company may "desire that the Charter gives them to construct the main "line, **and with the same rights and privileges, "and with the same duties and restrictions:** "and may for the main line and branches, acquire, as pro- "vided in the Charter and by this amendment, the right "of way one hundred and fifty feet wide, or more, if neces- "sary; and the quantity of acres of land which they are "authorized by the Charter to acquire and hold, shall be "exclusive of the right of way of the road and branches."

There has never been any attempt to reduce the rates prescribed by appellee's Charter, nor has the Legislature ever claimed, so far as we can judge by the legislation of fifty

years, the right to do so, unless that right was asserted by implication in the Act which is the subject of this controversy. (And we shall presently prove that the Legislature never intended to attempt any repeal of those Charter provisions.) It is true that within the last few years certain general laws have been adopted prescribing penalties against the railroad companies for charging and collecting more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in the State, and it is also true that there was an indictment against the Louisville & Nashville Railroad Company for the alleged offense of charging more than reasonable rates, and upon a trial the appellee was convicted and fined in the sum of five hundred dollars, but upon an appeal the judgment of conviction was reversed, the Court concluding its opinion in the following language:

"It may be observed further, however, that it would "seem singular if such a statute, even if in all respects "valid, could be enforced against a carrier whose rates as "fixed in its Charter are in excess of the rates alleged to "be excessive in the indictment. And this, not because "such rates are secured by an irrepealable contract, a mat-"ter not now considered, but simply because they at least "remain the legal rates until changed by law."

L. & N. R. R. Co. vs. Commonwealth, 99 Ky., 132, 143.

In March, 1900, the Legislature adopted a law granting to the Railroad Commission the very extensive powers described in our other brief. A copy of the Act may be found in this record at pages 5 and 6, and in the appendix to this brief. In the bill of complaint (Rec., 4) the provisions of appellee's Charter fixing the rates of charges are set out. It is further

alleged that **all of the Company's rates which it is now charging are less than the rates which the Company has the right to charge by its Charter contract.** (Rec., 7.) It is further alleged by the 9th paragraph of the bill as follows:

"IX. Defendants have called for and obtained from "your orator a list of rates fixed and charged by it for "transportation of freight and passengers over its railroad "in the State of Kentucky, for the purpose of considering "whether or not they shall be altered and reduced in "accordance with the terms of said Act, and are giving it "out in speeches and interviews that they intend to pro- "ceed at once under said Act, and, unless restrained by the "order of this Court, defendants will proceed at once to "hear and determine complaints under said Act, although "the same is in contravention of the Constitution of the "United States in all the particulars hereinabove set out, "and is therefore null and void, and will proceed there- "upon to **reduce your orator's rates** to such as they "think your orator should charge, and will thereafter at "pleasure modify and **still further reduce the rates** "**so fixed,** and if your orator does not observe the rates "so fixed, no matter how unjustly and unreasonably low, "your orator will be subjected to innumerable prosecutions "throughout the State of Kentucky, for failing to comply "with such rates fixed in this unconstitutional manner, "and it will be subjected to innumerable suits by con- "signors and consignees, who will claim the right to ship "at said rates so unconstitutionally fixed, and to sue for "any excess they may be charged over said rates, though "rightfully charged, and at the same time all your orator's "officers and agents and servants, though perfectly innocent

"of any offense, and though merely assisting your orator "to maintain its constitutional rights, will be indicted, "prosecuted and heavily fined, to the great demoralization "of the public service which your orator is bound to ren- "der, and so it is, unless said defendants are restrained by "the order of this Court from proceeding under said Acts, "your orator's contract rights will be impaired, it will be "deprived of its property without due process of law, "denied the equal protection of the law, and subjected to "great, irreparable wrong and injury, and to a vast multi- "plicity of prosecutions and actions in the courts of said "State."

A demurrer was interposed to this bill, thereby of course confessing its allegations that appellee's rates are already lower than its Charter gives the right to charge, and that appellants are about to reduce them further, thus subjecting appellee to innumerable criminal prosecutions and civil suits for failure to observe this attempted reduction. The demurrer being overruled, the appellants declined to answer and stood by the demurrer, and have appealed to this Court from the final judgment of the Circuit Court perpetuating the injunction against the appellants which restrained them from

"entertaining any complaint against the appellee for fix- "ing any rates of toll or compensation which appellee "may charge or collect or receive, or from entering any "such rate, toll or compensation on the record of their "office, or signing the same, or mailing any copy thereof "to any officer, agent or employe of the appellee, or from "taking any action whatever against or in relation to the "appellee under the Act of March 10, 1900, entitled 'An "Act to prevent railroad companies or corporations owning

"and operating a line or lines of railroad, and its officers, "agents and employes, from charging, collecting or receiv- "ing extortionate freight or passenger rates in this Com- "monwealth, and to further increase and define the duties "and powers of the Railroad Commission in reference "thereto, and prescribing the manner of enforcing the "provisions of this Act and penalties for the violation of "its provisions', approved on the 10th day of March, 1900."

On the branch of the case treated in this argument, the opinion of the Circuit Court is as follows:

"As applying specially to the Louisville & Nash- "ville Railroad Company the Court is further of opin- "ion that the Act can not be maintained, because, without "attempting directly, and probably not at all, to repeal "the provisions of the Charter of that Company as to max- "imum rates, it still leaves it within the power of the Com- "mission to make it a crime for that railroad to charge the "rates which its Charter expressly authorizes. Again, it "is not to be inferred that, even if the Charter of this Com- "pany can be amended, it was done by implication by the "Act before us. And still again, as the Charter of that "Company was passed before 1856, when the general law "was first enacted reserving to the State the power there- "after to amend all Charters of corporations, it probably "can not be changed at all without its consent, which it is "not pretended has been given. But whether so or not, it "can only be done, if at all, by language which is plain and "unmistakable, and not merely by so doubtful an implica- "tion as is presented here." (Rec., 25.)

II.

In this argument we shall maintain:

First—That the Legislature has by words of **grant,** not merely of limitation, given by an irrepealable contract, the right to the appellee to fix its own rates within the maximum limits prescribed, "to charge **any sum not exceeding** the following rates," etc.

Second—That whether the Charter provisions fixing the rates are subject to repeal or not, they have not been repealed, and on the admitted allegations of the bill the injunction should have been granted.

For the convenience of the Court we publish in the appendix to this brief—

1. The Act which is the subject of controversy and which for brevity we shall call the McChord Law.

2. The Charter provisions relied upon as constituting the contract fixing the rates of the appellee.

3. So much of the statute relied upon as constituting the contract in each of the cases in which this Court has had under consideration a subsequent statute alleged to be inconsistent with the statute claimed in that case to constitute the contract. The statute will in each case be found under the style of the case in which it is considered, so that this Court may readily compare these different statutes with each other and with the Act relied upon in this case as constituting a contract. We have not always been able to quote literally from the statute, but in such cases the substance of the claim, as gathered from the Court's opinion, is given.

The consideration of this question is not complicated by any power of alteration or amendment reserved in the Charter or any of its amendments, or by a general law.

The appellants rely upon a number of cases as being inconsistent with our contention in this case. The cases relied upon by them are: C., B. & Q. R. Co. vs. Iowa, 94 U. S., 155; Ruggles vs. Illinois, 108 U. S., 526; The Railroad Commission Case, 116 U. S., 307; Georgia Railroad & Banking Co. vs. Smith, 128 U. S., 174; Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362; Covington, etc., Turnpike Co. vs. Sanford, 164 U. S., 586; Smyth vs. Ames, 169 U. S., 466; C., M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418; Pennsylvania R. R. Co. vs. Miller, 132 U. S., 75; Fertilizing Co. vs. Hyde Park, 97 U. S., 659; Winchester Turnpike Co. vs. Croxton, 98 Ky., 739; Laurel Park & Sandy Hill R. Co. vs. West Va. Transportation Co., 25 W. Va., 324; Regan vs. Aiken, 9 Lee (Tenn.), 610. A number of these cases can be disposed of without special notice, because they so palpably lack any application. Thus in the case of Smyth vs. Ames, 169 U. S., 466, there was no contract claimed or involved. In C., M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418, the Charter provided that the Directors of the corporation should have the power to make all needful rules, regulations and by-laws touching the rates of toll and the manner of collecting the same. There was no other contract provision relied upon. This case is entirely governed by the principles laid down in the case of Ruggles vs. Illinois, 108 U. S., 526, the effect of which was to hold that the by-laws must not be inconsistent with the laws of the State then existing or thereafter enacted. Pennsylvania Railroad Co. vs. Miller, 132 U. S., 75, involved simply the construction of a statute, and there was no question of contract concerning rates involved in the case. The Fertilizing Co. vs. Hyde Park, 97 U. S., was a case which involved the exercise of police power in a case where the health of the inhabitants was involved. The Court held, first, that there was ample space within the

territorial limitations described by the Act in which the business could be carried on, and therefore it was proper to abate the nuisance in the village of Hyde Park, and second, that the Legislature could not make a contract injurious to health. Mr. Justice Miller wrote a separate opinion concurring in the main opinion upon the first ground stated.

The remaining cases will be considered more in detail.

In the case of C., B. & Q. R. Co. vs. Iowa, 94 U. S., 155, it was claimed by the appellant that under its Charter and the Constitution and laws of Iowa which existed at the time of its organization the Company had the right to fix the rates of compensation for transportation of persons and property over its road; that the laws of the State became a part of its Charter and constituted a contract between the Company and Iowa, the legal effect of which was to give the Company the right to fix and regulate its own rates free from legislative control. There was no pretense that the rates which might be charged, or even that the maximum rates which might be charged, had been specified by the Legislature. The Legislature in that case could not have been said to have exercised its judgment as to the reasonableness of the rates in any way whatsoever, and the Court holds that under such circumstances it was proper for the Legislature to regulate the rates of the road. In delivering the opinion, however, Chief Justice Waite said:

"But when the Legislature steps in and prescribes a "maximum charge, it operates upon the Company as upon "an individual. It was within the power of the Company "to call upon the Legislature to fix permanently this limit "and make it a part of the Charter. . . . If that had "been done the Charter might have presented a contract "against legislative interference."

In Ruggles vs. Illinois, 108 U. S., 506, Section 6 of an amended Charter which was relied upon declared:

"That the Company shall have power to make, ordain "and establish all such by-laws, rules and regulations as "may be deemed expedient and necessary to fulfill the "purposes and to carry into effect the provisions of this "Act, and for the well-ordering, regulating and securing "of the affairs, business and interests of the Company, "provided that the same be not repugnant to the Con- "stitution and laws of the United States or of this State "or repugnant to this Act. The Board of Directors shall "have power to establish such rates of toll for the convey- "ance of persons or property upon the same, as they shall "from time to time by their by-laws determine, and to levy "and collect the same for the use of said Company. The "transportation of persons and property, width of track, "and all other matters and things respecting the use of "said road shall be in conformity to said rules and regula- "tions as the Board of Directors shall from time to time "prescribe."

As we have heretofore noted, the Court holds that a by-law must be at all times consistent with the laws of the State existing at the time the by-laws are made, or thereafter enacted.

Mr. Justice Harlin in concurring in this opinion at page 537 extracts from the authorities certain principles, as follows:

"These cases establish, among others, these principles: "1. That the Charter of a railroad corporation is a con- "tract within the meaning of the contract clause of the

"Federal Constitution. 2. That such corporation may "be protected by its Charter against absolute legisla- "tive control in the matter of rates for the carriage of "passengers and freight. 3. That when the Charter is "granted subject to such regulations as the Legisla- "ture from time to time may provide, or subject to the "authority of the Legislature to alter or repeal it, in "either of such cases, the Legislature has the same power "over rates or tolls that it had when the Charter was "granted. 4. In the absence of statutory regulations upon "the subject it is necessarily implied from the occupation "of a railroad corporation that it shall exact only reason- "able compensation for carriage."

In the Railroad Commission Case, 116 U. S., 307, the Act relied upon as a contract declared:

"SEC. 12. And be it further enacted that it shall be "lawful for the Company hereby incorporated from time "to time to fix, regulate and receive the toll, and charges "by them to be received for transportation of persons or "property on their railroad or way aforesaid hereby au- "thorized to be constructed, erected or built, or upon any "part thereof."

Again in this case the legislative judgment as to the reasonableness of the rates or prescribing a maximum of rates is wholly wanting, and the statute simply gives the road a right which would have been implied without the statute, viz.: the right to collect tolls for services performed. The Court held that this statute did not deprive the State of its power within the limits of its general authority as controlled by the Constitution of the United States, to act upon

the reasonableness of the tolls and charges fixed and regulated by the Company. In the course of the opinion, however, it is said:

"This is not in conflict with the judgment of the "Supreme Court of Mississippi in Railroad Commission "vs. Yazoo & Mississippi Railroad Co. in which it was "decided that the power had been surrendered in favor of "that Company because in that Charter a maximum of "rates was fixed. In the opinion, a copy of which has "been furnished us in advance of its publication in the "regular series of reports, the Court says distinctly that 'a "grant in general terms of authority to fix rates is not a "renunciation of the right of legislative control so as to "secure reasonable rates. Such a grant evinces merely a "purpose to confer power to exact compensation, which "shall be just and reasonable. It is only where there is "an unmistakable manifestation of a purpose to place the "unrestricted right in the corporation to determine rates "of compensation that the power of the Legislature after-"wards to interfere can be denied.'" (Page 330.)

The Mississippi case referred to by the Court is reported under the style of Stone vs. The Yazoo & Mississippi Valley R. R. Co, in 62 Mississippi, page 608.

The sixth section of that Charter gave to the Directors of the Railroad Company the power to fix the rates provided it should not exceed certain specified rates.

The Mississippi Court held in construing that Charter that so long as the Company did not exceed those rates that it had a contract right to charge them, of which it could not be deprived by subsequent legislation, and that opinion was before this Court at the time it rendered its opinion, and as

we have seen was approved by it. The opinion in the Mississippi case was delivered by Chief Justice Campbell. The Court, while not quoting literally from the statute, states its effect as follows:

"Section 6 of the Charter of the appellee confers on "the company power to fix from time to time by it Board "of Directors the rates at which it will transport persons "or property over its railroads, provided they shall not "exceed the maximum specified in the Act." (641), and speaking of the power thus granted said:

"That it was the legislative intent to vest in the appel- "lee the unrestricted right to fix rates within the limits "prescribed by the Charter is clear; that this was a valid "contract by the State, obligatory and inviolable by it, we "regard as settled authoritatively by Federal and State "decisions too numerous for citation.

"If anything is or ever can be settled in American con- "stitutional law, the sanctity and inviolability of a con- "tract between a State and individuals in the shape of a "Charter for a business enterprise, accepted and acted on "by the corporators on the faith of its terms and provis- "ions, must be so regarded.

"The appellee has the unquestionable right from time "to time, by its Board of Directors, to fix the rates at "which it will transport over its railroads, provided those "rates shall not exceed the maximum prescribed by the "Charter. That is the contract. These terms were "expressly made. On the faith of them capital was "invested and the enterprise set on foot. It is not allow- "able now for one of the contracting parties to interfere "with the exercise by the other of its plainly granted

"rights. They are secured beyond the reach of legisla-
"tion and can not be impaired. The State can not, by
"an act of its Legislature, abdicate the right to govern
"artificial as well as natural persons, but it may create
"corporations, and where they are not a part of the
"machinery of government, the franchise can not be
"resumed by the Legislature or its benefits be essentially
"impaired without the consent of the grantee. To hold
"otherwise would be revolutionary and disturb the founda-
"tions of society as moulded by the judicial utterances
"of half a century of constitutional government in
"America."

The next case is that of the Georgia Railroad Co. vs. Smith, 128 U. S., 174. This case is particularly relied upon by the appellants.

By the twelfth section of the Company's Charter, among other things, it was declared that—

"The said Georgia Railroad Company shall at all times
"have the exclusive right of transportation or conveyance
"of persons, merchandise and produce over the railroad
"and railroads to be by them constructed while they see fit
"to exercise the exclusive right: Provided that the charge
"of transportation or conveyance shall not exceed fifty cents
"per hundred pounds and ten cents per cubic foot on
"articles of measurement for every 100 miles, and five cents
"per mile for every passenger: Provided, always, that the
"said Company may, when they see fit, rent or farm out all
"or any part of their exclusive right of transportation or
"conveyance of persons on the railroad or railroads, with
"the privilege to any individual or individuals or other
"Company, and for such terms as may be agreed upon,

"subject to the rates above mentioned. And the said "Company in the exercise of their right of carriage or "transportation of persons or property, or the persons so "taking from the Company the right of transportation or "conveyance, shall, so far as they act on the same, be "regarded as common carriers." (Page 174.)

The Court held:

First—That the rates named were intended as a limitation on the right to charge, so long as the Company was given the exclusive right to operate the road.

Second—That it was at least intended as a **limitation** on the right to charge, and not as a **grant** of power to charge up to the limit.

The Court, however, in that case used this significant language:

"It is conceded that a railroad corporation is a private "corporation, though its uses are public, and that a con- "tract embodied in terms in its provisions, or necessarily "implied by them, is within the constitutional clause pro- "hibiting legislation impairing the obligation of contracts. "If the Charter in this way provides that the charges which "the Company may make for its services in the transporta- "tion of persons and property, **shall be subject only "to its own control up to the limit designated, "exemption from legislative interference "within that limit will be maintained."** (Page 182.) (Our italics.)

The Court holds in accordance with all the authorities, that such a grant will be strictly construed, and must be given in unmistakable language that can not be **reasonably** construed consistently with the reservation of the powers of the State. We shall presently undertake to show

that our case meets fully the requirements laid down in this opinion for an enforcible contract.

In the case of Reagan vs. Farmers Loan and Trust Co., 154 U. S., 362, no provisions of the Charter prescribing rates are stated in the opinion or statement of facts, as being a part of the Charter contract.

The Court, however, after referring to the Dartmouth College Case as the beginning of the law on this subject, says:

> "The International and Great Northern Railroad "is a corporation created by the State of Texas. The "Charter which created it is a contract whose obligations "neither party can repudiate without the consent of the "other . . . **If the Charter had in terms "granted to the corporation the power to "charge and collect a definite sum per mile for "the transportation of persons or of property, it "would not be doubted that the express stipu- "lation formed a part of the obligation of the "State which it could not repudiate."** (Page 392.) (Our italics.)

In the case of the Covington Turnpike Co. vs. Sanford, 164 U. S., 586, the alleged contract was not upheld because it was held that the contract provision with reference to rates had not passed from the old company to the new company. We are not permitted to doubt, however, from the whole trend of decision and especially from the opinion of the learned Justice who delivered this opinion, viz., Justice Harlan, that if the question had been made by the old company, in other words, if the consideration of the case had not been complicated by the transfer of the privileges from one company to the other, the contract would unquestionably

have been upheld as a valid, subsisting, enforcible contract.

The case of Laurel Fork & Sandy Hill Railroad Co. vs. West Virginia Transportation Co., 25 W. Va., 324, stands practically alone in this country as holding that it was not within the power of the Legislature to grant a Charter to a railroad Company in which it might make, by any language that should be used, a contract prescribing definitely the rates which might be charged. The case proceeds upon the theory often denied by this Court, that the railroad company is not a private corporation but a quasi-public corporation, and comes within the rule so often laid down as to municipal corporations. The opinion is a very long one and the Judge has shown an almost inexhaustible fund of patience and research in finding a great many cases which have bitterly criticised the principles laid down in the Dartmouth College Case; but while it is true that these principles laid down in the Dartmouth College Case have been perhaps more vigorously assailed than the principles of any other case of this or any other Court, it is also true that in the main these principles, as Chief Justice Waite said in Stone vs. Mississippi, 101 U. S. 816, "have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself"; and this Court, in its opinion by Mr. Justice Brown in Pearsall vs. Great Northern R. R. Co., 161 U. S., 660, said:

> "The doctrine of this case has been subjected to more "or less criticism by the Courts and by the profession but "has been reaffirmed and applied so often as to have be- "come firmly established as a canon of American juris- "prudence."

It would therefore be quite remarkable if at this day this Court should give any weight to an opinion of a Judge of any

Court, who should practically refuse to follow the Dartmouth College Case.

In Regan vs. Aiken, 9 Lee (Tenn.), 610, the Charter provision simply fixed the maximum of charges, and this was not done in language of **grant,** but in plain language of **limitation,** exactly as was done in the case of Georgia Railroad Co. vs. Smith, 128 U. S. The language of the statute here, however, is not the language of **limitation** upon the power to charge. It is the language of **grant;** it is language granting absolute power to the Directors of the Company to charge **any sum up** to the maximum limit prescribed and clearly comes within the rule laid down in the Smith case, supra.

We do not question the proposition that grants of exclusive privileges must be strictly construed, but that does not mean that ingenuity shall be set in motion to devise any construction, however strained, which language may be tortured into meaning, without reference to the intention of the parties. It means only that such grants shall not pass by implication, or if two constructions, each of which is reasonable, lie open, that one must be adopted most unfavorable to the grantee and most favorable to the public.

In Morawetz on Private Corporations (Section 316), the author says:

> "There is no reason why a charter should be construed "differently from other written instruments. The object "should be to discover the intention of the parties, and it "would be absurd to attempt to ascertain the intention of "the parties by the application of any technical or arbi- "trary rule."

Again, in 23d American and English Encyclopedia of Law, page 374, under the title of "Strict Construction," it is said:

"Strict construction, as applied to statutes, means that "they are not to be so extended by implication beyond "the legitimate import of the words used in them as to "embrace cases or acts not clearly described by such "words, and to bring them within the prohibition or "penalty of such statutes. **It does not mean that "words shall be so restricted as not to have "their full meaning,** but that everything shall be "excluded from the operation of statutes so construed "which does not clearly come within the meaning of the "language used." (Our italics.)

Fair illustrations of this well-expressed explanation of the rule as to strict construction may be found in a number of cases often cited in support of the rule.

Thus in Providence Bank vs. Billings, 4 Peters, 514, the charter of a bank was silent on the subject of taxing the Bank, and the corporation claimed that it was thereby exempt from taxation. The Court applied the rule now relied on by appellee, and said such a privilege could not be presumed.

In Charles River Bridge vs. Warren Bridge, 11 Peters, 419, a bridge company by its charter was given the right to build a bridge across a river. It insisted the right was **exclusive,** but the charter did not say so, and the Court refused to extend the language used.

In Bailey vs. Maguire, 22 Wallace, 215, an amendment to a charter provided that the corporation should pay the same rate of taxes to the State as assessed by the State on other real and personal property. The corporation under this claimed exemption from all taxes except **State** taxes. No such exemption was given by the charter, and the Court refused to imply it.

In Stein vs. Bienville Water Co., 141 U. S., 67, the exclusive right had been given this water company to supply Mobile with water from Three-Mile Creek. The Company claimed under this the exclusive right to furnish the city with water from this creek, **or from any other source.** The Court applying the rule under consideration refused to so extend the words of the grant.

So in South Carolina vs. The Coosaw Mining Co. (144 U. S., 562), the Court said the rule was applicable to a case where an act "is **fairly** susceptible to either construction"; and that it meant that "nothing passes by mere implication."

On the other hand, consider the Binghampton Bridge case, 3d Wallace, 51. Here the Court admitted the rule, now contended for, in as strong terms as any case has done, but showed that it was not permitted thereby to reject or distort the plain meaning of plain language; and it upheld the contract there claimed. It would take too much space to set forth here the various provisions of the acts which together were claimed to constitute a contract giving the Chenango Bridge Co. the exclusive right to maintain a bridge over a river for the space of four miles, where it was shown that the population of the town at which it was built had grown from a little hamlet to a city of ten thousand people; that they were scattered along both sides of the river; that the depots and public buildings were situated on both sides of the river half a mile above the bridge, thus requiring people to go half a mile down the river and then half a mile up on the other side in order to go between such buildings; and that the bridge was utterly inadequate to the public needs.

It was necessary to establish a regular chain of title through four different charters, with varying provisions, to

make out the contract claimed; and counsel opposing it insisted it was "a contrivance to obtain a contract without the Legislature being aware that one was given," and referred in strong language to the "covert designs of the draftsman," etc. (page 67); and showed that while it was claimed that the exclusive right covered a space two miles above and two miles below the bridge, merely by reference to the charter of another bridge company over another river, yet in this case the river did not, in fact, extend more than one hundred rods below the bridge where it emptied into another river. Counsel therefore contended that this provision of the first Charter over the Delaware River could not have been intended to apply to the one over the Chenango River. The Court admitted the rule as to resolving doubts in favor of the public, etc., but still said:

> **"All contracts are to be construed to accomplish the intention of the parties; and in determining their different provisions, a liberal and fair construction will be given to the words, either singly or in connection with the subject matter. It is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold it and give it effect: and no strained or artificial rule of construction is to be applied to any part of it."**

And again, while speaking of this case, we refer the Court to further language in the opinion on the subject of considering the times and circumstances under which the Charter was granted, in construing its provisions. The Court said:

"It is impossible to read this recital and escape the "conclusion that the Legislature thought the enterprise "did not promise present remuneration, and that large "powers and exclusive privileges must be given, to get the "stock taken and the bridges built. It is evident that "what was then considered a great scheme of internal im- "provement was in the mind of the Legislature. Such a "scheme was, at that early period in the history of the "State, not of easy solution. It required more energy and "foresight, and involved greater hazard, in the commence- "ment of this century, to build turnpike roads through an "unbroken wilderness and erect bridges over dangerous "streams, than it would now to checker the surface of a "State with railways. These considerations are great "helps in arriving at a correct knowledge of the intention "of the Legislature, and in giving a proper construction "to the grants that were made. **For it should never "be lost sight of that the main canon of the "interpretation of a contract is to ascertain "what the parties themselves meant and "understood."** (Our italics.)

Now the Legislature, not by **implication,** but in express terms, in the Charter of the appellee has said that "the President and Board of Directors shall have power to charge . . . **any sum** not exceeding the following rates, to-wit:" etc., naming the maximum of rates there specified.

And if it be true that "the main canon of the interpretation of a contract is to ascertain what the parties themselves meant," if it be true that "it is not the duty of a court, by legal subtlety, to overthrow a contract, but rather to uphold and give it effect," if it be true that "no strained or artificial

rule of construction is to be applied to any part of it," then it is true that appellee has the "power to charge . . . . . **any sum** not exceeding" the rates named in the Charter, simply because the Charter plainly says so. And if it be true, as alleged in the bill and admitted by the demurrer, that the rates now charged by appellee are **less than those named in the Charter,** then appellee has the power to charge these rates; and to take away that power is to violate a plain contract right.

In the Court below the counsel for appellee laid much emphasis on the words in the latter part of the clause under consideration as follows: "They shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort," which, if they stood alone, might be read as mere words of limitation and bring this case within the rule of the Georgia Railway Company vs. Smith, supra, but the Court will observe that these words are simply used in describing the limitation that follows the preceding general grant of power, viz., **"they shall have power to charge . . . any sum not exceeding the following rates, viz."** Under the "viz." in enumerating "the following rates", the language is used with reference to a certain kind of freight, that "they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort." In other words, there is an express grant of a specific power followed by words of limitation, and the words relied on by appellants are merely used in describing this limitation upon the preceding express grant. Or, to repeat the thought in slightly different form, there is a general **express grant,** as to **all kinds of freight,** of "the power to charge . . . **any sum** not exceeding" certain limitations. Then in describing these limitations the Charter, as to certain kinds of freight specifically states the

maximum charge, while as to other kinds of freight, instead of specifying the limitation in detail, it makes use of a limitation prescribed by a scale of charges fixed in another Charter by providing that, as to this character of freight, "they shall charge no greater rate than is authorized to be charged" in this last mentioned Charter. The rates specified in the Lexington & Frankfort Charter are simply made use of to describe or specify what is meant by "the following rates" where the Charter of appellee says, "they shall have power to charge **any sum . . . not exceeding the following rates, viz.**"

We submit that this language is not a mere **limitation** on the right to charge greater rates than those specified, but it is an express provision granting the right to charge **any sum** less than those rates fixed as the maximum, either in the Charter of the appellee, or in the Charter of the Lexington & Frankfort Railroad.

We are now brought to the last case upon which the counsel rely, and that is the case of Winchester, etc., Turnpike Co. vs. Croxton, 98 Ky., 739.

In this case the Kentucky Court of Appeals held, in avoidance of a plain contract, that the language did not constitute a permanent contract because the **duration of the period** during which the rates prescribed might be charged was not given. The language in that case of the Charter contract is as follows:

"SEC. 15. It shall be lawful for the President and "Managers to collect and receive of and from all and every "person or persons using said road the tolls and rates "hereinafter mentioned, and to stop any person riding, "leading or driving any horse, etc., until they shall have "paid toll agreeable to the following rates, to-wit: For

"every hundred head of hogs, sheep or small stock 6¼ "cents," etc.

After disposing of some unimportant question the Court proceeds to consider and discuss the main question as to whether the provisions of the Charter evidence an irrevocable contract between the State and the corporation. It cites a number of cases, the authority of which is of course admitted, to the effect that such grants shall be strictly construed, and then concludes that such a contract will not be held to be a durable one unless the time during which the right to charge the rates prescribed is definitely fixed, or unless it is expressly declared that the right to make these charges shall continue forever.

The Court cites a number of cases in which it says that the words of contract are used, and that the duration of the contract was particularly prescribed. Among others it cites Gordon vs. Appeal Tax Court, 3 How., 133, where it was declared that—

"Upon any of the banks of the State complying with "the provisions of the Act, the faith of the State is hereby "pledged not to impose any further tax or burden upon "them during the continuance of their charters under this "Act. The Court continues: 'Language equally strong "and explicit was used in the case of State Bank of Ohio "vs. Knoop, 16 How., 369; Bridge Proprietors vs. Hobo-"ken, 1 Wall., 116; and in Home of the Friendless vs. "Rouse, 8 Wall, 430.'

"In the first of the three cases mentioned, viz., the "Knoop case, the Charter contract is contained in the "60th section which provided that 'each bank coming "under the Act or accepting thereof, and complying with "its provisions, shall semi-annually, on the days designated

"for declaring dividends, set off to the State six per cent. "of the profits, deducting therefrom the expenses and "ascertained losses of the company for the six months "next preceding. Each semi-annual amount so set off "shall be in lieu of all taxes to which the company or "the stockholders therein should otherwise be subject, the "sum so set off to be paid to the Treasurer on the order "of the Auditor of the State.'"

It is perfectly obvious from this language that there was no duration prescribed to the contract in the Knoop case.

The Court, as was subsequently said in the Binghampton Bridge case, endeavored to arrive at the intention of the parties, and it seemed to the Court that the only reasonable conclusion to arrive at was that this contract of commutation of the taxes was, in the absence of any other language limiting it, co-extensive and should be deemed to be co-extensive in time with the Charter itself. This is emphasized by the fact that Mr. Justice Campbell in his dissenting opinion suggested that there was no time limit fixed for the duration of that feature of the contract which affected the commutation of taxes, but the majority of the Court rejected that idea and held that the contract was enforcible, and at a very much later date, an almost exactly similar provision was found in the charter of a Tennessee bank and came under the review of this Court in the case of Farrington vs. Tennessee, 95 U. S., 689, and was sustained as a contract. The language in that case was:

"That the said Company shall pay to the State an an- "nual tax of one half of one per cent. on each share of the "capital stock subscribed, which shall be in lieu of all "other taxes."

If the reasoning of the Court of Appeals of Kentucky had been sound this Court might well have said that because no time limit was fixed to this contract of commutation, it might have been repealed by the next succeeding Legislature; but it did not do so; it held in a strong opinion that the contract must be enforced; and while there were dissents from this opinion, these dissents did not touch this question, but proceeded upon an entirely different ground, viz., that the contract of exemption by the bank did not exempt the stock in the hands of the holders.

In the case of Franklin County Court vs. Bank of Kentucky, 87 Ky., 375, the Court had before it three Charters. In one it was expressly provided that the contract of commutation should be co-extensive with the Charter itself, but in the other two it did not so provide, and yet the Court of Appeals in Kentucky by its unanimous opinion upheld all the contracts as meaning the same thing.

In the case of Binghampton Bridge Company, 3 Wall., 51, the Charter life of the Company was perpetual, and yet the provision of the statute which was upheld as a contract did not declare that the right thereby granted should last forever. It simply provided that it shall not be lawful for any person or persons to erect any bridge or bridges within two miles either above or below the bridge to be erected and maintained in pursuance of this Act.

If this Court had cared to adopt the reasoning of the Kentucky Court it could quite easily have held that that contract dealt only with the existing condition of affairs and could not be held to prevent the erection of another bridge, after the little hamlet, which existed at the time of the grant, had grown into a city of ten thousand inhabitants, and another bridge was required to accommodate the wants of the public, but this Court felt itself bound under the plain language quoted, to uphold the claim of contract in perpetuity.

In the case of the Home of the Friendless vs. Rouse, 8 Wall., 430, the Charter provision relied upon as constituting the contract was:

"All property of said corporation shall be exempt "from taxation, and the 6th, 7th and 8th sections of the "1st article of the Act concerning corporations approved "March 19, 1845, shall not apply to this corporation."

The 7th section thus referred to provided that the Charter of every corporation that should thereafter be granted by the Legislature should be subject to alteration, suspension and repeal at the discretion of the Legislature.

The Court in its opinion upon considering this statute and upholding the legislative grant, said:

"It is true that legislative contracts are to be construed "most favorably to the State if on a fair consideration to "be given the Charter, any reasonable doubt arise as to "their proper interpretation; but, as every contract is to be "construed to accomplish the intention of the parties to it, "if there is no ambiguity about it, and this intention clearly "appears on reading the instrument, it is as much the duty "of the Court to uphold and sustain it as if it were a con- "tract between private persons. Testing the contract in "question by these rules, there does not seem to be any "rational doubt about its true meaning. 'All property of "said corporation shall be exempt from taxation,' are the "words used in the Act of incorporation, and there is no "need of supplying any words to ascertain the legislative "intention. **To add the word 'forever' after the "word 'taxation' could not make the meaning "any clearer."** (Our italics.)

The Court reached the conclusion there stated simply from the language of the grant of exemption from taxation

(which fixed no period of duration) and without reference to the subsequent language which suspended the operation of the general reservation law; and after it had reached that conclusion merely says that it is "fortified" by other language which had the effect of suspending the reservation Act.

Judge Curtis in his argument asserted that the effect of the language suspending the reservation Act was equivalent to an assurance that the legislative power should not thereafter be used to interfere with the franchise, but in speaking of this feature of the Act he asserted that it was "very unusual if not unprecedented." What greater effect then should be given to that Act, than should have been given, if it had been adopted prior to the adoption of a general reservation law?

It was at the time of the adoption of the Charter of the appellee a matter of general knowledge, constantly acted upon by the very Legislature that granted the Charter, that except as the right of alteration or repeal was expressly reserved in the Charter granted, it did not exist. The failure therefore to reserve such control was equivalent to an express declaration that the contract should never be altered by any future Legislature except with the consent of the corporation.

An examination of the Kentucky Acts of 1849–50 will disclose that in forty-three charters granted by that Legislature to private corporations the right to alter or amend was reserved in language substantially the same in every instance, the usual from of expression being: "The Legislature shall from time to time have power to alter, change or amend this Charter." (See Acts of 1849–50, pages 115, 123, 127, 138, 147, 150, 156, 179, 181, 207, 209, 211, 213, 224, 227, 230, 234, 277, 278, 287, 305, 335, 340, 341, 345, 372, 405, 486, 492, 496, 504, 516, 537, 553, 577, 582, 586, 607, 628, 648, 653, 678, 712.)

There were also passed that session a number of charters of private companies in which the right was not reserved An examination of these will show that they covered the incorporations of banks, insurance companies, churches, schools, turnpikes, bridges and railroad companies. There were during that session seven railroad companies incorporated, and it is significant that the right to alter or amend was not reserved in any of them, which shows that that Legislature believed that the true interest of the State would be subserved by making these irrepealable contracts with railroad companies for the material development of the State; nor will any one at this day question the wisdom of that policy upon the part of the Legislature when the agency which railroad companies have had in the development of every branch of industry in the State is remembered.

It was much more difficult at that day than at this to accomplish such enterprises. The wealth of the country had not become then, as it has later, centered in a few hands; there were not many citizens in this State very strong financially, and the hazard to capital thus invested seemed much greater then than now. It is not at all probable that any of the railroad companies would have accepted their Charters or undertaken the construction of their roads if the Legislature had retained the power of repeal or amendment. This conclusion is justified not only by the history of the time but by the failure of the Legislature to retain control over the Charter. Therefore we insist that when it is remembered that the Legislature knew that by refraining from reserving the right of alteration or amendment it was giving and intended to give an irrepealable contract during the chartered existence of the Company, the Charter in this case should be read and understood to have exactly the same effect as if in words it had been said that no future Legislature shall

alter or amend in any material respect the Charter hereby granted without the consent of the corporation.

In the case of the Bridge Proprietors vs. Hoboken, 1 Wall., 116, the Act is not quoted literally, but Mr. Justice Miller thus states the effect of it:

> "The Act also contained a provision that it should be "unlawful for any person or persons to build any other "bridge within limits which were defined on each side of "these bridges."

How long this prohibition was to last was, so far as we can see, not stated in the Act, but this Court held, over seventy years afterward, when, as said by Mr. Justice Miller, "a period of time equal to three generations of the human race had elapsed," that the contract was still a subsisting valid contract and the prohibition enforcible against the construction of **similar** bridges, but that **railroad** bridges were not within the contemplation of the parties and therefore not included in the prohibition. Thus it seems clear that the very authorities cited by the Kentucky Court fail to sustain it in the position taken by it.

With due respect for the opinion of the Kentucky Court of Appeals in the Winchester Turnpike case, supra, it seems to us the suggestion that the agreement as to tolls was entirely subject to the will of the Legislature because of the failure to state the duration of the period during which the contract tolls should apply, falls within that class of cases suggested above where ingenuity has been misused to avoid a plain contract, to which the faith of the State had been pledged.

There can not be any reasonable doubt that the Legislature thought it was giving, and that the Turnpike Company

thought it was receiving, an irrepealable contract right to charge such tolls as it was given the right to charge by its Charter. If the Charter had provided in so many words that the right to charge the prescribed tolls should never be taken away by any subsequent Legislature without the consent of the Company, it is conceded by the learned Court that there would be no way of avoiding the contract. And yet it can not be questioned that the Legislature which granted the Charter knew it had the right to retain control over the Charter contract, by expressly reserving it, and that its failure to do so was equivalent to an express statement that the contract should never without the consent of the Company be changed, and since it is agreed on all hands, that the intention of the parties should be effectuated, it surely can not make any difference how that intention is ascertained so that it be manifest.

We have examined a great many cases both in this Court and in the various States and many in Kentucky, in which contracts have been upheld, and while in a considerable number of them the time within which the contract relied upon was to operate, was expressly named, we feel quite confident we are right in saying that in the great majority of the cases where the contract was upheld, the time limit was not fixed, and in each of those cases this Court and the courts of the States could have easily avoided the contract if they had been inclined to adopt the reasoning of the Kentucky Court.

At the time the Charter of the Louisville & Nashville Railroad Company was granted the State of Kentucky was practically without means of transportation by rail, and it was the intention of the Legislature to grant to the Louisville & Nashville Railroad Company the right to fix its own rates within the limits prescribed. And it was on the faith of such Charter contract, then clearly recognized and acted

upon, that the Louisville & Nashville Railroad Company proceeded to expend millions of dollars in providing lines of transportation within Kentucky and to bring Kentucky into close touch with all the vast region of territory now traversed by the various lines of that Company.

We take the liberty of quoting liberally from the well considered case of P., W. & B. R. R. Co. vs. Bowers, 4 Houst. (Del.), 506. The Charter provided that the Company was authorized to demand and receive such sum or sums of money for tolls of persons or property as the Directors should from time to time think reasonable, provided that the toll on any species of property should not exceed eight cents per ton per mile, nor on passengers four cents per mile. A subsequent Act limited the right to charge to a point below that fixed in the Charter, and was assailed on the ground that it impaired the obligation of the contract. The Court sustained the contention and held the subsequent act void for the reason stated.

In its opinion the Court said:

"In the first place, then, since the decision of the cele-
"brated Dartmouth College Case, in 1819 (4 Wheat., S. C.
"Rep., 518), it has ceased to be a point for discussion that
"a corporate charter is a contract within the prohibitory
"clause referred to; and further, that a charter is none
"the less protected against legislative interference although
"the franchise granted be one in the exercise of which
"the public are interested, if, nevertheless, the corporation
"itself be a private one. For, the uses of a corporation
"may in a certain sense be public, and yet the corporation,
"with its franchises and property be private—as much so
"as if such franchises and property were vested in a single
"person instead of in a company; and nothing can be
"clearer than that franchises and property which in their

"nature are private must be equally inviolate whether "vested in a corporation or in an individual. To this "class of private corporations for public uses belong a "large number, such as colleges, banks, insurance, turnpike "companies, etc. A broadly marked distinction is taken "in the Dartmouth College Case between these quasi-"public corporations and those of a more limited class "which are strictly public corporations. The latter might "be more properly distinguished as civil or municipal cor-"porations. These are created by the Legislature solely "for purposes of local government, such as are incorpor-"ated cities, towns, or counties. They are depositories of "a portion of the political power of the State, which they "exercise not as a private franchise but as a public trust— "as the mere agents or trustees of the Legislature, subject "to its supervision and control. Such a charter is not in "any proper sense a contract **inter partes** within the "prohibitory clause of the Constitution. It is therefore "revocable, and is subject to alteration at the pleasure of "the Legislature, saving any private rights and interests "which may have previously become vested under the "action of the corporate body. But charters creating "what may be termed business corporations possess all the "ingredients of contracts. First, there are parties whose "concurrent action is essential to give them force and "effect, the Government proffering and the corporations "accepting the franchise, with such privileges and condi-"tions as the Legislature may see fit to attach to it. There "are also mutual obligations impliedly assumed by the "parties—the Government becoming bound, on the one "hand, for the secure enjoyment by the grantees of the "corporate franchise, according to the terms and condi-"tions of the charter, and the corporators on the other "hand, undertaking, in consideration of the privileges

"bestowed, to exercise them faithfully for the purposes "contemplated in the grant of them. Further, the busi- "ness conducted under such charters, quite as much as "like enterprises set on foot by persons unincorporated, is "provided for by private capital invested by the corpora- "tors for their individual profit, and the property held and "employed by the corporation belongs to the corporators."

Again the Court says:

"We may next proceed to inquire whether the Act of "the General Assembly under consideration impairs the "obligation of the contract contained in the Charter of the "Railroad Company. And to this question also the "Dartmouth College Case will be found to afford a clear "and conclusive answer.

"The sense of the phrase 'impairing the obligation of "a contract' and the precise effect of the constitutional "prohibition will vary somewhat according to the subject "matter to which it is applied. In the case of contracts "wholly executory, which were doubtless those directly "contemplated by the Constitution, the operation of the "clause would be to prohibit any law discharging or releas- "ing a party to the contract from the stipulations under- "taken to be performed on his part or modifying such "stipulations. It is thus that a State insolvent law which "undertakes to discharge a debt contracted prior to its "passage comes in conflict with the constitutional provis- "ion. Where the contract is an executed one, as is a "grant, the obligation of it is held to be impaired by a law "operating to divest any right of estate which has passed "or become vested under the grant. Such was the con- "struction of the phrase under consideration in the cele- "brated case of Fletcher vs. Peck, 6 Cranch, 87, in which

"an Act of a State Legislature, undertaking to re-assume "rights which had vested under a grant made by a prior "Legislature, was held to impair the obligation of the "contract implied in the grant. The Dartmouth College "Case was the first in which this phrase 'impairing the "obligation of a contract,' received a direct judicial con- "struction as applied to a corporate charter. Such a "charter would seem to be quite clearly within the "principle of Fletcher vs. Peck. For treating a charter "simply as a grant or executed contract, the franchise "which is the subject matter of the grant, must be as "clearly protected by the Constitution against any revoca- "tion or abridgement of it, as is a title to land which may "be the subject of a legislative grant. But a charter is a "contract both executed and executory; and viewing it in "the latter aspect, the Court in the Dartmouth College "Case held that in the grant of a charter there is an "implied contract on the part of the Government that the "corporators having accepted the franchise, shall, so long "as they exercise their corporate powers faithfully, in "accordance with the ends and purposes of their incorpora- "tion, enjoy the franchise as fully and beneficially as it is "granted, without abridgement or alteration. Hence the "Court deduced as the principle of its decision, that a law "altering the charter in any of its material provisions, "without the consent of the corporation, impaired the "obligation of the contract. Now, what will or will not "amount to such a material alteration of the charter as to "bring a law into conflict with the constitutional prohibi- "tion it may not be easy to define, but it is sufficient and "quite safe to say that an Act having the effect to abridge "or restrict any power or privilege vested by the charter "which is material to the beneficial exercise of the fran- "chise granted, and which must be supposed to have

"entered into the consideration which induced the corpo-
"rators to accept the charter and to assume the duties
"imposed by it, is such an alteration as the constitutional
"provision forbids, and that any Act so operating is
"invalid.

"Let us apply this principle to the case in hand. The
"object and effect of the law under consideration is to reg-
"ulate, and so far to restrict, the power of the railroad
"company to charge for the transportation of passengers
"and freight. Of such a power it is hardly enough to say
"that it is one of value and importance to the Company;
"it is one essential to the enjoyment of the franchise, and
"must be presumed to have been the consideration for
"which the corporators accepted the charter, invested their
"money, and assumed the obligations imposed upon them.
"It was undoubtedly competent for the Legislature, by a
"provision in the Charter, to reserve to itself the right to
"supervise and regulate in the future this power of the
"Company; but upon a careful examination of the orig-
"inal Acts, incorporating the several companies now com-
"posing the Philadelphia, Wilmington & Baltimore Rail-
"road Company, we are unable to find in them any
"reservation of such legislative control over these com-
"panies as is necessary to sustain the Act under considera-
"tion. The power to adjust its tariff of charges by its own
"officers, according to their views of the necessities of
"business and of justice to the public, without supervision,
"was a part of the franchise as it was granted. The
"attempted regulation by the Legislature of this power
"materially abridges the beneficial exercise of it by the
"corporation, and without any doubt impairs the obliga-
"tion of the contract in the sense of the Constitution as
"interpreted by the Dartmouth College Case."

In that case it will be seen that the Company had the right to charge any sum the Directors might determine on, not to exceed the maximum stated in the Charter. In that respect that case is more nearly analagous to the case at bar than any we have been able to find (except the one next referred to), and we submit that the conclusion reached by the Delaware court was necessary to give effect to the statute; and that a similar conclusion is equally necessary to effectuate the intention of the Legislature in its grant to the appellee.

The latest and most comprehensive and carefully prepared review of all the authorities upon the question under discussion, as well as one of the ablest opinions we have read upon the subject, will be found in the case of Pingree vs. Michigan Central Railroad Company, decided in 1898, and reported in 76 N. W. Rep., 635. The statute which was relied upon and which was upheld as a contract was in the following language:

"SECTION 15. That it shall be lawful for respondent "from time to time to fix, regulate and receive the tolls, "and charges taken for the transportation of property and "persons on said railroad, subject only to a limitation as "to passengers of three cents a mile and ten cents in addition on distances not exceeding thirty miles."

It was insisted by the State:

First—That there was not power in the Legislature to make such a contract, so that it could not be altered or changed by subsequent Legislatures.

Second—That if there was such power, the language employed was not sufficient to constitute an irrepealable contract.

Other questions were raised and considered not involved in this case. The Court held in a very carefully prepared

opinion, depending very largely upon the decisions of this Court for its authority, (1) that the State did have the right to make such a contract; (2) that the language employed could not be reasonably construed otherwise than as intended to constitute a contract between the parties, and as such, must be upheld. In reaching this conclusion, all of the decisions of this Court and other courts which have dealt with the question are considered, and upon a review of all the cases decided by this Court, which have directly or indirectly borne upon the question, as well as other cases, the Michigan court reached the conclusion that the words quoted were sufficient to constitute, and did constitute, a valid, irrepealable contract. We will not quote from this opinion, but ask the Court's special attention to the case. The difficulty about quoting from this case is that it is so entirely devoted to a careful review of the authorities and discussion of the precise question involved, that we could hardly stop short of quoting the whole of that part of the opinion devoted to the questions above stated, and this would unduly prolong our brief.

It is, however, asserted by the Commonwealth, though not argued, that the acceptance of various amendments by the appellee, since the adoption of the reservation Act of 1856 (Appendix to Commonwealth's brief, page 150) operated as a waiver by the appellee of its contract rights. It is not pretended that such an inference can legitimately or reasonably be drawn from the language of any of the amendments, nor is any suggestion offered that such was the purpose of either the State or the appellee, but as we understand it, the contention is that the acceptance of any kind of an amendment without reference to the purport or intention of the Act would operate as a waiver of the contract right.

It would seem as an original proposition that there is little or no merit in the point, but we submit the question is

now concluded by the opinion of this Court in the case of Turnpike Co. vs. Sandford, 164 U. S., 578, which refused to give such an effect to an amendment affecting the very subject-matter of the contract.

It is next suggested that the contract as to rates applies only to the road between Louisville and the State Line in the direction of Nashville, Tennessee, but we submit that there is little merit in this suggestion: First, because it was of course expected that the general rights and franchises granted by the original Charter, such as fixing and taking tolls, condemnation, etc., should apply to all the lines which might be owned and operated by the appellee. (See Atlanta & Gulf R. R. Co. vs. Allen, 15 Fla., 662; Humphrey vs. Peaques, 16 Wall., 247.) Second, because by the very language of the amendment of 1851 to be found in the original brief, as well as in the appendix, the appellee was given as to branches constructed by it the same rights and privileges, subject to the same duties and restrictions as are given and imposed by the original Charter, leaving absolutely no doubt upon the proposition that the Legislature intended by these well-chosen words to give to the appellee exactly what the language imports, viz., all the rights and privileges, subject to the same limitations and restrictions over the branch lines, which were expected to become a part of the system as much so as the original road, as was given in the original Charter over the main line. Of course it goes without saying that when these branches are constructed there is no distinction in operating the road between the main line and the branches. They are all operated as one, and the Legislature knew that, and intended that the same rights and privileges should cover all.

It is true that while perhaps the principal branches were constructed by the L. & N. R. Co., yet some of the branches

were purchased by the L. & N., but we submit that it has been adjudged by this Court in the case of Branch vs. Jessop, 106 ~~100~~ U. S., 468, that under a right to construct a branch, the Company would not be bound to construct in order to secure the road authorized by the Charter to be constructed, if the road was at hand already built, but instead of constructing in such a case which would parallel an existing road, and make the acquisition of the road undesirable, the Company would have the right to buy the road. This is what the Court held in the Jessop case, in an opinion delivered by Mr. Justice Bradley, and we submit that the reasoning of the Court is unanswerable. The case has never been doubted since, so far as we know, and we submit that the decision is conclusive of the question. The second syllabus of the decision is as follows:

"A railroad company having the right of constructing "and operating lines of railroad, with general power to "purchase all kinds of property of whatever nature or "kind, may purchase from any other company a road con- "structed on that line if the latter company had power to "sell and dispose of the same."

An examination of the Charter in that case will show that the general grant of the power to purchase all kinds of property was no broader, and indeed could not be any broader than the language of the Charter of the appellee (which authorized the purchase of all kinds of property, real, personal and mixed.) In each instance the language was probably intended only to allow the purchase of all kinds of property touching the operation of the road authorized, but the Court held that under such language there was a right to purchase any road, which the company had the right to construct. (Page 484.)

We submit that this decision is in accordance with the plainest principles of good sense and reasoning, and that the power to construct carries with it the power to buy, if the desired road be found already constructed.

While we think this right to construct is broad enough, yet by the Act of January 17, 1856 (Appendix to Commonwealth's brief, pages 152–3), express power was given to purchase and hold any road constructed by another company. The Company has always until recently supposed that this amendment was intended to authorize the purchase of independent roads, but this Court held in the case of L. & N. vs. Commonweath, 161 U. S., 667, that it applied only to purchasing branch roads. This Act as the counsel for the Commonwealth properly conceded, was approved and became effective January 17, 1856. What we have said heretofore on the subject of the principal line and branch roads being operated as one road, under the rights, privileges and franchises of the original Charter, applies equally to any road that might have been purchased under this amendment. In none of these amendments will it be found that the Legislature ever supposed that it was necessary to give any additional rights and privileges usually enjoyed by railroads, but they have acted consistently upon the principle that whatever might be done in the way of operating railroads bought or constructed under the amendments would be done under the original Charter.

III.

CONSTRUCTION OF STATUTES.

But if we are wrong in our contention that we have here an irrepealable contract which must be upheld, still it is, we submit, entirely plain that the provisions of appellee's Charter, prescribing the rates of toll for appellee, have never been changed. The doctrine that implied repeals are not favored is certainly a principle of law perhaps as generally understood by lawyers and lawmakers as any other principle embodied in the jurisprudence of the country. We could probably refer the Court to a case from every court in this Union whose opinions are published, holding to that proposition, but it seems quite a waste of time to collect authorities on that subject from other courts in view of this Court's opinions on the question. The authorities will be found reviewed in the case of Cope vs. Cope, 137 U. S., 682, where the principle is laid down that no statute will be construed as repealing a prior statute unless so clearly repugnant thereto as to admit of no other reasonable construction; and in the case of Ward vs. Race Horse, 163 U. S., 511, this Court recognized that the settled rule of construction undoubtedly is that repeals by implication are not favored and will not be held to exist if there be any other reasonable construction. If the Act now under consideration should be held to be a repeal of the Charter provisions of the appellee, it could only be done by going to such a length in favor of implied repeals as to completely upset and overthrow the settled doctrine of the country on that question.

The Charter and Act in question are not inconsistent and may stand together. The McChord Law will have ample material to act upon if it be applied only to those companies

whose rates are not prescribed by statute. Furthermore, it could be made to apply to the appellee if the appellee could be shown to be charging rates exceeding those prescribed in its Charter, but in view of the fact that it stands admitted by the demurrer that all of the rates now being charged by the appellee are less than those prescribed by the Charter, we submit that the judgment of the Circuit Court can easily be affirmed upon this ground alone.

An examination of the McChord Law in connection with the case of the Louisville & Nashville Railroad Company vs. the Commonwealth, 99 Ky., 132, makes it, it seems to us, too plain to admit of dispute that the McChord Law was not intended as a repeal of the Charter provisions of the contract of the appellee, nor indeed was intended to apply to the Louisville & Nashville Railroad Company. It will be noticed by reference to the McChord Law that it does not permit the Railroad Commission to fix any rates for any railroad company **until the Railroad Commission has found the company guilty of extortion.** The Court in the case of the Louisville & Nashville Railroad Company vs. Commonwealth, supra, clearly holds that the Louisville & Nashville Railroad Company **can not be guilty of extortion until its Charter rates are exceeded.** The bill alleges, and the allegation is admitted by the demurrer, that all the rates being charged by the appellee are **less than those permitted by the Charter. Therefore it follows that the Railroad Commission can not legally find the Louisville & Nashville Railroad Company guilty of extortion,** and therefore it necessarily follows that as to the Louisville & Nashville Railroad Company the Railroad Commission **can not legally fix or reduce its rates.** Hence, we say that

the conclusion is irresistible that the McChord Law was not intended at all to apply to the Louisville & Nashville Railroad Company.

In conclusion we suggest that in view of the opinions of this Court so often expressed, it was proper under the circumstances and on the allegations of the bill, to take jurisdiction to prevent the manifold oppressions and numerous suits and prosecutions which would have resulted if the Railroad Commission had been allowed to proceed in the enforcement, as against appellee, of the McChord Law.

We respectfully ask that the judgment be affirmed.

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HELM BRUCE,
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Counsel.

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WALKER D. HINES,
Of Counsel.

AUTHORITIES CITED AND REVIEWED.

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C., B. & Q. R. Co. vs. Iowa, 94 U. S., 155.
Ruggles vs. Illinois, 108 U. S., 526.
Railroad Commission Cases, 116 U. S., 307.
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Reagan vs. Farmers Loan & Trust Co., 154 U. S., 362.
Covington Turnpike Co. vs. Sanford, 164 U. S., 586.
Smith vs. Aimes, 169 U. S., 466.
C., M. & St. P. R. Co. vs. Minnesota, 134 U. S., 418.
Pennsylvania Railroad Co. vs. Miller, 132 U. S., 75.
Fertilizer Co. vs. Hyde Park, 97 U. S., 659.
Winchester Turnpike Co. vs. Croxton, 98 U. S., 739.
Laurel Park & Sandy Hill R. Co. vs. West Virginia Trans. Co., 25 W. Va., 3.
Regan vs. Aiken, 9 Lee (Tenn.), 610.
Mississippi Railroad Co. vs. Yazoo & Mississippi R. Co., 62 Miss., 608.
Morawetz on Private Corporations, Sec. 316; 23 Am. & Eng. Ency. of Law, 374.
Providence Bank vs. Billings, 4 Peters, 514.
Charles River Bridge vs. Warren Bridge, 11 Peters, 419.
Bailey vs. Maguire, 22 Wall., 215.
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Pingree vs. Michigan Central R. Co., 76 N. W. R., 635.
Cope vs. Cope, 137 U. S., 682.
Ward vs. Race Horse, 163 U. S., 511.

APPENDIX.

"McChord Law."

An Act to prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the Railroad Commission in reference thereto, and prescribing the manner of enforcing the provisions of this Act and penalties for the violation of its provisions.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

Section 1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this Commonwealth, or when said Commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said Commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, argument or evidence offered by the parties as the Commission may deem relevant, and should the Commission determine that the company or corporation is, or has been guilty of extortion, said Commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may

charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the Commission shall be entered and be an order on the record book of their office and signed by the Commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation for like services thereafter rendered than that made and fixed by said Commission, as herein provided, said company or corporation, and said officer, agent, or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars.

SEC. 2. The Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employe shall have jurisdiction in all prosecutions against said officer, agent or employe.

SEC. 3. Prosecutions under this Act shall be by indictment.

SEC. 4. All prosecutions under this Act shall be commenced within two years after the offense shall have been committed.

SEC. 5. In making said investigation, said Commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the Chairman of the Commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment.

Approved March 10, 1900.

EXTRACTS FROM CHARTER OF LOUISVILLE & NASHVILLE RAILROAD COMPANY AND SECTIONS OF THE CHARTER OF THE LEXINGTON & FRANKFORT RAILROAD COMPANY MADE BY REFERENCE PART OF THE CHARTER OF THE LOUISVILLE & NASHVILLE RAILROAD COMPANY.

EXTRACT FROM SECTION 18, L. & N. CHARTER.

SEC. 18. That the President and Directors shall have power to purchase, with the funds of said Company, and place on any railroads constructed by them under this Act, all machines, wagons, vehicles or carriages of any kind, which they may deem proper, for the purposes of transportation on said road; and that they **shall have power** to charge for tolls, and the transportation of persons, merchandise and property of any kind whatever, transported along said railway, **any sum** not exceeding the following rates, to-wit: On all goods, merchandise or property, for every one hundred pounds transported over twenty miles and under fifty miles, three and a half mills for each mile; and for persons, and every species of live stock and every description of freight and property, they shall charge no greater rate than is authorized to be charged on the railway from Lexington to Frankfort.

Approved March 5, 1850.

Extract From Section 20, Charter of Lexington & Frankfort Railroad Company.

Sec. 20. Be it further enacted, That the said Board of Directors shall have power to purchase, with the funds of said Company, and place on any railroad constructed by them under this Act, all machines, wagons, vehicles or carriages, of any description whatsoever, which they may deem necessary or proper for the purposes of transportation on said road, and they **shall have power** to charge for tolls, and the transportation of persons, goods, produce, merchandise, and property of any kind whatsoever transported by them along said railway between Lexington and the Kentucky River, **any sum** not exceeding the following rates, to-wit: For transporting any distance single packages weighing less than one hundred pounds, twenty-five cents; and at that rate, if such packages weigh more than one hundred pounds; for transporting goods, produce, merchandise or property of any kind, not less than three and a half mills, nor more than four mills per hundred pounds weight per mile; for transporting passengers, not less than three and a half cents per mile, nor more than four cents per mile for each passenger, with his baggage not weighing more than forty pounds; except upon the article of coal, upon which there shall be charged not less than three cents on the bushel; but the charge on coal shall at no time be fixed at a rate which will not yield a profit on its transportation.

Live stock, poultry and furniture; also feathers, wool, rags, and other light, bulky articles, weighing not more than sixty-five pounds to the cubic foot; also silver and gold, bullion, money of all descriptions, and mails are excepted from the rates herein established; and the Board of Directors, or their agents, shall be and they are hereby authorized to contract specially for their transportation, upon such terms as

the parties interested may agree upon: Provided such rates shall in no case exceed fifteen per cent. over the rates allowed to be charged for heavy merchandise or produce, except for gold, silver, bullion, money of all kinds and mails. The said Board of Directors, and their agents, may charge for receiving, forwarding and storing such articles and packages as may be consigned to them, or deposited in their warehouses, or with their agents, for safe keeping, or to be forwarded; and they may establish by their by-laws, rates of storage and other fees for such services. But they shall make no rule or regulation, giving any preference in transportation of goods or other articles sent from other houses, stores or places; nor shall they make any difference in the rates of charges on goods or other property consigned to other persons for transportation on said road; but shall, in all things, receive and receipt for goods and property of every kind consigned to other persons on the same terms as if consigned to themselves.

Approved February 28, 1848.

AMENDMENT APPROVED FEBRUARY 26, 1849, TO CHARTER OF LEXINGTON & FRANKFORT RAILROAD COMPANY.

SECTION 1. Be it enacted by the General Assembly of the Commonwealth of Kentucky: That the minimum rates for the transportation of persons, goods, produce, merchandise and property of every kind, established by the twentieth section of the "Act to Incorporate the Lexington & Frankfort Railroad Company," except that upon the article of coal, be, and the same are, hereby abolished, and the Board of Directors of said Company **shall have power** to charge for tolls, and the transportation of persons, goods, produce, merchandise and property of every kind (except coal), **any sum** they may deem proper, not exceeding the maximum rates prescribed by said twentieth section.

Amendment of Louisville & Nashville Railroad Company's Charter, Approved March 2, 1851.

Sec. 2. That said Company shall have power and authority to construct their road from the city of Louisville to any point or place in the direction of Nashville, Tennessee, and to connect the same with any railroad extending to Nashville, on such terms and conditions as the two companies may, from time to time, agree on, for the through transportation and travel of freight and passengers; and said Company shall have the same power and authority to construct a branch of said road to the Mississippi River, and any other branch said Company may desire, that the Charter gives them to construct the main line, and with the same rights and privileges, and with the same duties and restrictions, and may, for the main line and branches, acquire, as provided in the Charter and by this amendment, the right of way one hundred and fifty feet wide, or more, if necessary; and the quantity of acres of land which they are authorized by the Charter to acquire and hold, shall be exclusive of the right of way of the road and branches.

Extracts from Charters Construed in Cases Cited.

C., B. & Q. R. Co. vs. Iowa, 94 U. S., 155.

"The Burlington & Missouri River Railroad Company, "the benefit of whose Charter the Chicago, Burlington & "Quincy Railroad Company now claims, was organized "under the general corporation law of Iowa, with power "to contract in reference to its business, the same as pri- "vate individuals, and to establish by-laws and make all

"rules and regulations deemed expedient in relation to its "affairs, but being subject, nevertheless, at all times to "such rules and regulations as the General Assembly of "Iowa might from time to time enact and provide. This "is, in substance, its Charter."

The language of the Charter in this case is not quoted, but the foregoing is a quotation from the Court's opinion giving the substance of the Charter. (Page 161.)

Ruggles vs. Illinois, 108 U. S., 526.

On the 19th of June, 1852, an Act was passed—

"To amend an Act entitled 'An Act to incorporate the "Central Military Tract Railroad Company.' Section 6 "of said Act is as follows: 'The said Company shall have "power to make, ordain and establish all such by-laws, "rules and regulations as may be deemed expedient and "necessary to fulfill the purposes and carry into effect the "provisions of this Act, and have the well-ordering, regu- "lating, and securing of the affairs, business and interest "of the Company: **Provided,** that the same be not re- "pugnant to the Constitution and laws of the United "States or of this State, or repugnant to this Act. The "Board of Directors shall have power to establish such "rates of toll for the conveyance of persons or property "upon the same as they shall from time to time by their "by-laws determine, and to levy and collect same for the "use of said Company. The transportation of persons "and property, the width of track, and all other matters "and things respecting the use of said road shall be in "conformity to said rules and regulations, as the said "Board of Directors shall from time to time determine.'"

Railroad Commission Cases, 116 U. S., 307.

On the 3d day of February, 1848, the Legislature of Alabama passed an Act to incorporate the Mobile & Ohio Railroad Company. Section 12 of that Act is as follows:

"SEC. 12. And be it further enacted, that it shall be "lawful for the Company hereby incorporated from time to "time to fix, regulate, and receive the toll and charges by "them to be received for transportation of persons or "property on their railroad or way aforesaid hereby author-"ized to be constructed, erected, built, or upon any part "thereof."

Stone vs. Yazoo, etc., R. Co., 62 Miss., 606.

"The sixth section of the Charter of the appellee con-"fers on the Company the power to fix from time to time "by its Board of Directors the rates at which it will "transport persons or property over its railroads, provided "they shall not exceed the maximum specified in the "Act." (Quotation from Court's opinion, page 641.)

Georgia Railroad & Banking Co. vs. Smith, 128 U. S., 174.

An Act to incorporate the Georgia Railroad, passed December 21, 1833.

By an Act of December, 1833, its corporate name was changed to Georgia Railroad & Banking Co.

The 12th section of the Charter among other things declared that

"The said Georgia Railroad Company shall, at all "times, have the exclusive right of transportation or con- "veyance of persons, merchandise, and produce over the "railroad and railroads to be by them constructed, while "they see fit to exercise the exclusive right; **Provided,** "that the charge of transportation or conveyance shall not "exceed fifty cents per hundred pounds, and ten cents per "cubic foot on articles of measurement, for every hundred "miles; and five cents per mile for every passenger: **Pro- "vided, always,** that the said Company may, when "they see fit, rent or farm out all or any part of their "exclusive right of transportation or conveyance of per- "sons on the railroad or railroads with the privilege to any "individual or individuals or other company, and for such "terms as may be agreed upon, subject to the rates above "mentioned. And the said Company, in the exercise of "their right of carriage or transportation of persons or "property, or the persons so taking from the Company the "right of transportation or conveyance, shall, so far as they "act upon the same, be regarded as common carriers."

P., W. & B. R. Co. vs. Bowers, 4 Houst. (Del.), 506.

The Company was authorized to charge such sum or sums of money for tolls of persons or property as the Directors should from time to time think reasonable, provided that the toll on any species of property should not exceed eight cents per ton per mile, nor on passengers four cents per mile.

Pingree vs. Michigan Central Railroad Co., 76 N. W. Rep., 635.

Section 15 provided:

"That it shall be lawful for respondent from time to "time to fix, regulate and receive the tolls and charges "taken for the transportation of property and persons on "said railroad subject only to a limitation as to passengers "of three cents a mile and ten cents in addition on dis- "tances not exceeding thirty miles."

141 to 145
Nos. 396 to 400

Office Supreme Court U.S.
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Clerk

Brf. of Humphrey, Hines, Helm, Colston, Wadsworth & Cochran

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Nos. 396, 397, 398, 399, AND 400.

For Appellees.

Filed Jan. 7, 1901.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLEE.

AND FOUR SIMILAR CASES.

BRIEF FOR APPELLEES.

A. P. HUMPHREY,
WALKER D. HINES,
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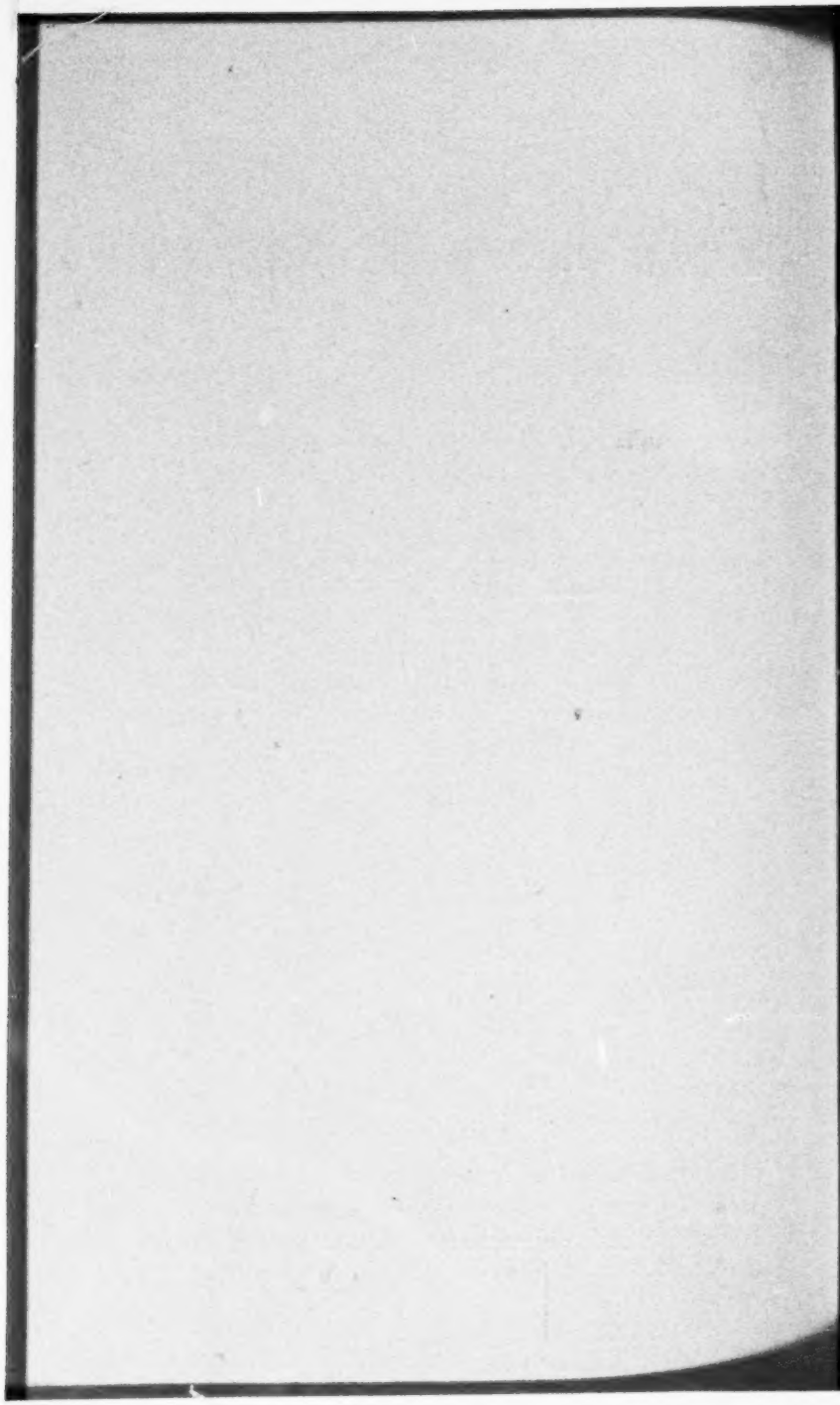

SUPREME COURT OF THE UNITED STATES

CHARLES C. McCHORD ET AL., - - - - - - - *Appellants,*

VERSUS

LOUISVILLE & NASHVILLE RAILROAD COMPANY, *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

CHESAPEAKE & OHIO RAILWAY COMPANY, - - *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, - - - - - - - - - - - *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

SOUTHERN RAILWAY COMPANY, - - - - - - - *Appellee.*

SAME, - - - - - - - - - - - - - - - - *Appellants,*

VERSUS

LOUISVILLE, HENDERSON & ST. LOUIS RAILWAY COMPANY, - - - - - - - - - - - - *Appellee.*

BRIEF FOR APPELLEES.

On March 12, 1900, the General Assembly of the Commonwealth of Kentucky passed the act which is the subject of this litigation, and which is commonly known and will be hereinafter referred to as the McChord act. This act is as follows:

"An act to prevent railroad companies or corporations owning and operating a line or lines of railroad and its officers, agents, and employes from charging, collecting, or receiving extortionate freight or passenger rates in this Commonwealth, and to further increase and define the duties and powers of the railroad commission in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violations of its provisions.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Sec. 1. When complaint shall be made to the railroad commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates over its line or lines of railroad in this Commonwealth, or when said commission shall receive information or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be investigated, and shall hear such statements, arguments or evidence offered by the parties as the commission may deem relevant; and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation, or any officer, agent or employe thereof charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employe shall each be deemed guilty of extortion, and upon conviction, shall be fined for the first offense in any sum not less

than five hundred dollars nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for third and succeeding convictions in any sum not less than two thousand dollars nor more than five thousand dollars.

"Sec. 2. The circuit court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin circuit court, shall have jurisdiction of the offense against the railroad company or corporation offending, and the circuit court of the county where such offense may be committed by said officer, agent or employe, shall have jurisdiction in all prosecutions against said officer, agent or employe.

"Sec. 3. Prosecutions under this act shall be by indictment.

"Sec. 4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"Sec. 5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall be paid by the State, and upon the certificate of the chairman of the commission, approved by the governor, the auditor shall draw his warrant upon the treasurer for its payment."

Appellees filed their bills in the Circuit Court of the United States for the District of Kentucky against Charles C. McChord, James F. Dempsey, and John C. Wood, seeking to restrain and enjoin them from taking any action whatever under said act against the respective complainants in the bills. Complainants contended that the McChord act would necessarily operate to deprive them of their property without due process of law, and deny to them the equal protection of the law, and was therefore in conflict with the Fourteenth Amendment of the Constitution of the United States. They further contended that the McChord act, by its terms, applied to interstate commerce, and was, therefore, in conflict with Clause 3 of Section 8 of Article 1 of the Constitution of the United States.

The Louisville & Nashville Railroad Company also con-

tended that the McChord act, if enforced, would necessarily impair the obligation of that company's contract with the Commonwealth of Kentucky evidenced by the charter granted to it by the Commonwealth of Kentucky to charge and authorizing it to charge not exceeding the rates specified and referred to in the charter. This contract right of the Louisville & Nashville Railroad Company will be discussed in a separate brief.

The circuit court, while holding that the McChord act was not in conflict with the commerce clause of the Federal Constitution, held that it necessarily operated to deprive the railroad companies of their property without due process of law, and to deny them the equal protection of the laws, and was therefore void. And, in view of the great multiplicity of suits and prosecutions which would otherwise ensue, and of the severely punitive consequences of the act, both to the railroad companies and to their employes, granted an interlocutory injunction upon the motion of complainants. The defendants demurred to the bills, and their demurrers were overruled, and the defendants declining to answer but standing by their demurrers, final decrees were rendered perpetuating the injunctions, and from these decrees these appeals are prosecuted.

It will be observed that the McChord act consists of two, and only two, branches. The first declares the contingency in which the railroad commission may take from the railroad company and assume for itself the rate-making power. The second provides a single method of enforcing the rates made by the commission in those cases where it has taken the rate-making power from the railroad company, that method of enforcement being by criminal prosecutions to impose heavy fines both upon the railroad company and its employes, varying from five hundred to five thousand dollars. Both branches of the act are necessarily in conflict with the Fourteenth Amendment of the Constitution of the United States, and on account of the interdependence of the two branches the unconstitutionality of either is fatal to the whole act.

ARGUMENT.

I.

THE PLAN PROVIDED BY THE McCHORD ACT FOR TRANSFERRING FROM THE RAILROAD COMPANIES TO THE RAILROAD COMMISSION THE RATE-MAKING POWER, DEPRIVES THE COMPANIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES THEM THE EQUAL PROTECTION OF THE LAW.

1. The State of Kentucky has not attempted either through its legislature or its railroad commission to make the rates for all the railroads in the State, as has been done in most States which attempt to regulate directly the rates charged by railroad companies. On the contrary, the State has chosen to leave the railroad companies to fix their own rates, subject only to the common law requirement that those rates shall be just and reasonable. This general system has not been changed by the McChord act. That act has not authorized or directed the railroad commission to take up as an original, independent proposition the admittedly legislative duty of making rates generally for the railroads. The railroads of the State are to continue to make their own rates, subject to the common-law requirement of reasonableness, without any interference, with the single exception that, if a railroad company be accused of having charged an extortionate rate, and if the railroad commission upon investigation of that charge find the company guilty of extortion, then for that particular sort of transportation service that railroad company forfeits absolutely and finally the right to make rates at all, and the commission thereupon acquires the right to fix a rate to be thereafter charged, and may subsequently modify that rate without any notice to or hearing of the railroad company.

The McChord act does not define the extortion which is to forfeit the railroad company's right to make its rates. The only common-law offense of extortion seems to be

> "The unlawful taking by any officer, by color of his office, of any money, or thing of value, that is not due to him, or more than is due, or before it is due." (1 Bouvier's Law Dictionary, 567.)

We must therefore look to other statutes for a definition of the word extortion as used in this connection in the McChord act, and such definition is supplied by Section 816, Ky. Stats., which reads as follows:

> "If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion."

Therefore, before a railroad company is to be deprived of its right to make any rate it must be convicted of having charged or received more than a just and reasonable rate with respect to the particular character of transportation service involved, as prescribed in the section just quoted, and such finding of guilt is, under the McChord act, to be determined conclusively and finally by the railroad commission.

In Louisville & Nashville Railroad Company v. Commonwealth, 99 Ky. 132 (the opinion in which is printed in Appendix II), the railroad company was indicted for extortion under the section just quoted, and the Court of Appeals held that the section could not be enforced as a penal statute because it did not fix any standard by which the carrier might regulate its conduct, and that to impose penalties upon a carrier under such a vague and uncertain statute would be to deprive the carrier of its property without due process of law, and in violation of both the State and Federal Constitutions. Thus, by this decision it was established that *a court*

could not find the railroad company guilty of extortion and thereby take from it any of its property on that account. Yet without any further definition of extortion the McCord act authorizes *the railroad commission* to find the company guilty of extortion and thereby take from it the right to make any rate for the future for the particular sort of transportation service involved.

In short, instead of conferring upon the commission the general right and duty to make reasonable rates for the railroads in the State, the legislature has left that right to the railroad companies, and authorized the commission to hear and determine accusations of extortion, and has imposed as a penalty upon guilty railroad companies the loss of their right to fix the particular rates involved.

The lower court in its opinion herein thus characterized the system prescribed by the McChord act:

> "It will be observed that there is no general power delegated to the commission to fix rates, nor does the statute creating the commission give it any such right. Its sole authority in the premises is stated in the act above set forth, and must be based upon its conviction of the railroad extortion. It can not move until what we may call this jurisdictional fact has been ascertained to exist, and then, having proceeded to determine that the railroad has been 'guilty of extortion,' although it has been furnished with no unmistakable statutory standard as to what is to be held to be extortion, it lowers the rate of that road for that particular service. Its own opinion, its own judgment, is the sole guide upon both questions. (Transcript, p. 21.)

The court pointed out that it is frankly and properly conceded that the railroad commission is not constitutionally a judicial body, and can not, under the Constitution or laws of Kentucky, rightly exercise judicial functions, and then said:

> "Our analysis of the act in question, however, has clearly shown that the whole apparent purpose of the act was to give the commission the judicial power or at least

the quasi-judicial power to 'hear and determine' whether a railroad has been 'guilty of extortion,' and as a result to lower the freight rate of that railroad for similar services." (Transcript, p. 22.)

Upon this aspect of the case the lower court stated its view of the law as follows:

"The investigation of a complaint and the decision thereon by the commission that the railroad complained of is 'guilty of extortion' being the only way to put the act in motion, the railroad is entitled to first have a judicial determination of the question of its guilt before the rate can be lowered as a penalty for the act charged to have been committed. The commission can not judicially nor by due process of law determine the one question upon which its right to fix a lower rate must depend. This is emphasized by the absence of any precise statutory standard by which the commission is to be guided as to what is an extortionate charge. The railroads have the inherent right to charge and collect a just and reasonable rate. Nothing short of a judicial proceeding conforming to due process of law, which not only includes due notice to the company interested, but a tribunal legally competent to act, can find a railroad guilty of extortion as a basis for imposing the arbitrary penalty of lowering their customary rates and as furnishing a stepping-stone to ulterior penalties of great severity which it is the obvious purpose of the act to have inflicted. The legislature may delegate to a commission power to establish rates generally, but not the power to try an individual railroad for an offense and lower its rates alone as the penalty of such conviction." (Transcript, pp. 23, 24.)

2. Although the State may have the power to take away entirely from railroad companies the right to fix their rates, yet obviously so long as it does not do so that right is one of great practical value and convenience to railroad companies. When the statute provides that this right shall be taken from a railroad company only when it is charged with extortion, and only to the extent that that charge is sustained, it is clear that every railroad company in the State continues to have a valuable interest in its

right to fix rates; indeed, this right is recognized by the McChord act itself, which in effect provides that it shall not be forfeited except where the railroad company has been guilty of extortion.

Counsel for appellants say the only penalty the railroad commission can inflict by a judgment convicting the railroad company of extortion is the fixing of a reasonable rate, and of this the railroad company has no legal right to complain. But the result is more far-reaching; it involves the complete destruction of the company's prior right to fix its own rate, subject to the requirement that it shall be just and reasonable, and transfers that right for all time to come to the railroad commission. The railroad company has a legal right to complain of this transfer under a statute which authorizes it only where the railroad company has been guilty of extortion when the determination of that question is not made in a constitutional manner.

This right has an intrinsic value to each railroad company considered by itself, and it has a distinct additional value of a comparative sort, for each railroad is vitally interested in having its right to make rates as untrammeled and unrestricted as the right of other railroad companies with which it has to compete.

So long, therefore, as the legislature chooses to predicate the withdrawal from the railroad company of its right to make rates solely upon a conviction of that company of extortion, the company has vitally important rights at stake when any such charge of extortion is brought against it, and it is entitled to have the determination of the charge surrounded with just the same constitutional safeguards as would be afforded if the result of the determination were the forfeiture of money instead of the forfeiture of a highly valuable right in the management of its business.

The McChord act fails to afford such constitutional safeguards because (1) it fails to prescribe a standard as to what shall constitute extortion in order that the railroad company may comply with the law and thereby retain the right to make its rates, and (2) it entrusts the determination of the essentially

judicial question involved, *i. e.*, whether the company has charged more than a just and reasonable rate, to the final and conclusive determination of a tribunal which is not a court, can not exercise judicial powers, and which in the nature of things is incapable of affording the judicial investigation and protection to which the railroad company is entitled. In both of these respects the McChord act operates to deprive the railroad company of its property without due process of law, and to deny to it the equal protection of the law.

3. For the Railroad Commission to take from the railroad company and assume for itself the power to make a rate, it must find the railroad company guilty of extortion, which, as above pointed out, is defined by Section 816, Ky. Stats. In L. & N. R. R. Co. v. Commonwealth, 99 Ky. 132, to which reference has already been made, it was clearly established in a forcible opinion that to inflict pecuniary penalties upon the railroad company by reason of rates theretofore charged, on the theory that such rates were in excess of just and reasonable rates, and therefore in violation of Section 816, Ky. Stats., when the legislature had prescribed no standard as to what were just and reasonable rates, would be the taking of property without due process of law and in violation of both State and Federal Constitutions. The opinion of the Court of Appeals in that case so fully and conclusively demonstrates the correctness of the decision that it seems unnecessary to discuss the matter at length in this brief.

We give the opinion in full in Appendix II.

While under the McChord act the conviction of the railroad company of the same indefinite offense of extortion does not result in the immediate infliction of pecuniary penalties, it does result in the infliction of a forfeiture of all right to make, or be consulted, or heard in regard to, any rate for the future with respect to the particular transportation service involved. As this is a substantial right of great importance to the railroad company, it is entitled to the same protection as if it were capable of valua-

tion in dollars and cents. As a penalty for violating Section 816, Ky. Stats., the legislature has simply substituted for the fine originally imposed the complete forfeiture of the railroad company's right to make rates with respect to the transportation service involved. If it is unconstitutional to deprive the railroad company of its money for a violation of Section 816, it is equally unconstitutional to deprive the company of its right to make rates for a violation of that section.

4. But in the case of the L. & N. R. R. Co. v. Commonwealth, *supra*, the procedure was at least in an ordinary court of justice, and the accused railroad company was accorded the rights accorded to other accused persons, so far as they were available under so vague a statute. The question involved in that case, whether the company had charged more than a just and reasonable rate, was admittedly a question for judicial investigation and determination.

Under the McChord act, however, notwithstanding the serious consequences of an adverse decision of the very same question as to whether the railroad company has charged more than a just and reasonable rate, the railroad company is not given the benefit of the protection or the procedure of an ordinary court of justice, and is not accorded the rights which are accorded to accused persons in courts of justice, but is shut up wholly to the final determination of an essentially non-judicial tribunal.

In Interstate Commerce Commission v. Railway Company, 167 U. S. 499, this Court said:

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act."

When the legislature has chosen to rest the deprivation of a railroad company's right to fix the rate for a particular trans-

portation service upon the question whether the rate the company has theretofore charged for that service is unreasonable, clearly the railroad company is entitled to a judicial determination of that essentially judicial question.

The railroad commission is not a judicial tribunal, and under the Constitution of Kentucky can not be.

Section 27 of the Constitution of Kentucky is as follows:

> "The powers of the government of the Commonwealth of Kentucky shall be divided into three distinct departments, and each of them be confined to a separate body of magistracy, to wit: Those which are legislative to one; those which are executive to another, and those which are judicial to another."

Section 28 of the Constitution of Kentucky reads as follows:

> "No person, or collection of persons, being of one of those departments, shall exercise any power properly belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

Section 109 of the Constitution of Kentucky reads as follows:

> "The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the Senate when sitting as a court of impeachment, and one Supreme Court (to be styled the Court of Appeals) and the courts established by this Constitution."

The courts established by the Constitution, in addition to the Court of Appeals, are Circuit Courts (Section 125), Quarterly Courts (Section 139), County Courts (Section 140), Justices' Courts (Section 142), Police Courts (Section 143), and Fiscal Courts (Section 144).

Section 135 of the Constitution of Kentucky reads as follows:

> "No courts save those provided for in this Constitution shall be established."

In Roberts v. Hackney, 58 S W. 810, the Court of Appeals of Kentucky held that the power to hear and determine the offense of contempt and fix the punishment therefor is a judicial power, which, under the Constitution of Kentucky, neither the mayor of a city nor the chairman of the board of trustees of a town can exercise. In its opinion the court said:

> "But by Section 108 of the constitution now in force, the judicial power of the Commonwealth is vested in the courts established thereby. These are the court of appeals, circuit courts, quarterly courts, county courts, justices' courts, police courts, and fiscal courts; Section 143 providing for the jurisdiction of police courts in cities of the sixth class, and Section 160 for the election of the police judge. Under this imperative provision of the constitution, no judicial power can be exercised by any other officer except those named, unless authorized by some other provision of that instrument."

By section 209 of the Constitution a commission was established to be known as "The Railroad Commission," to be composed of three Commissioners. After providing for the method of their selection and the filling of vacancies, the section provides:

> "The powers and duties of the Railroad Commissioners shall be regulated by law; and until otherwise provided by law, the Commission so created shall have the same powers and jurisdiction, perform the same duties, be subject to the same regulations, and receive the same compensation as now conferred, prescribed, and allowed by law to the existing Railroad Commissioners."

The Constitution of Kentucky did not establish the railroad commission as a court. At the time of the adoption of the Constitution the railroad commission was essentially a ministerial tribunal. (1 Acts 1881–2, p. 66.) After the adoption of the Constitution the legislature, in pursuance of its powers preserved by Section 209, re-enacted the railroad commission law,

and it was provided that the duty of the commission should be (Ky. Stats., Sec. 821):

> "To see that the laws relating to all railroads, except street, are faithfully executed, and to exercise a general supervision over the railroads of the State."

Thus the railroad commission of Kentucky is essentially an administrative or ministerial tribunal, charged in that capacity with the supervision of the railroads of the State and with the duty of seeing that those railroads obey the laws. Not only is the railroad commission without judicial powers, but it possesses functions and is charged with duties which in the nature of things render it not a fit tribunal to exercise judicial powers.

In Western Union Telegraph Company v. Myatt, 98 Fed. Rep. 335, the United States Circuit Court for the District of Kansas held the act of Kansas creating the Court of Visitation to be in conflict with both the State and Federal Constitutions, because it entrusted to one tribunal final judicial powers as well as wide powers of an administrative and legislative character. The court said (p. 354):

> "In view of what has been said of the court of visitation and the nature of the various powers conferred upon it, would a judicial proceeding before said court to determine the reasonableness of a body of rates be due process of law, within the meaning of the first section of the Fourteenth Amendment to the Constitution?
>
> "Due process of law in judicial proceedings means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights. In legislative proceedings it requires a conformity to the settled maxims of a free government, and an observance of constitutional restraints and requirements. In either case it means that there should be an omission to exercise substantial powers appertaining to the other department. Courts can not legislate and pass judgment thereon. Legislative bodies, or boards that are constituted as legislative agencies, can not render judgment upon their legis-

lative acts. In either case neither the proceeding nor the result would be due process of law. . . . It would certainly be as inconsistent with our system of jurisprudence to empower them to act judicially in matters whereof they had legislative or administrative cognizance, as it would be to confer judicial powers upon an executive officer. . . . That the important powers of government differing so widely in their essential characters might lawfully be vested in a single board or tribunal, to be exercised upon the life, liberty, or property of a person, is a startling proposition, and it would suggest the inquiry whether our plan of government has not insensibly drifted far away from its ancient moorings."

The same statute came shortly afterward before the Supreme Court of Kansas, and that court likewise held it to be unconstitutional for the same reasons. In the course of its opinion that court said:

"While the line of division between the three powers is not marked distinctly, and it is not always easy to lay down an abstract rule defining each of the separate powers of sovereignty, all courts and all authority unite in holding that the rate-making power is intrinsically legislative. In exercising such power, whether by the legislature or by a commission, general rules prescribing the duties, fixing the rights, and regulating the conduct of persons and corporations in the future are made, and the combining of such a power with those essentially judicial, or vesting it in a court, is a palpable and flagrant violation of the constitutional principle and limitation regulating the separation of the sovereign powers." (State v. Johnson, 60 Pacific, 1068, 1074.)

But not only does the McChord act confer the final judicial power of determining whether the railroad company has in the past been guilty of extortion upon an administrative tribunal, whose general duties are essentially incompatible with the exercise of judicial powers, and thus violate fundamental constitutional principles; the act goes further and offers a direct inducement to that tribunal to decide against the railroad com-

pany the judicial question submitted to it by conferring upon it, in the event of such adverse decision, the distinctly legislative power of making rates for the future, without any notice to or hearing of the railroad company.

Not unnaturally, administrative boards are disposed to extend their power and importance. It is well known that this disposition frequently manifests itself. The McChord act therefore affords a direct and powerful motive to induce the railroad commission to decide against the railroad company the judicial question which the legislature has said must be decided against the railroad company before it can be deprived of any of its rate-making powers.

Appellants' counsel not only concede but insist that the railroad commission is not a court and does not exercise judicial powers. Clearly, therefore, it is not competent to pass upon the essentially judicial question, upon a decision of which the legislature has chosen to base every withdrawal from a railroad company of its power to make any rate.

It must be borne in mind that the result of a decision by the railroad commission adverse to the railroad company on the question whether the company has been guilty of extortion is very much more far-reaching than the mere immediate change in the rate, for it means the permanent forfeiture by the railroad company of any power over the rates for the particular transportation service involved, and the transfer to the railroad commission for all time to come of the power to make the railroad company's rates, without any notice and without any hearing.

We contend, therefore, that the first branch of the McChord act is wholly unconstitutional, because it authorizes railroads to be deprived of the valuable right of making their rates only when they are found guilty of extortion, but fails to define what shall constitute extortion that the company may know how to comply with the law and retain control of its rates; and because it confides the exclusively judicial question whether the company has been guilty of such extortion to an administrative tribunal,

thus depriving the company of the protection of a court of justice, and gives to the non-judicial tribunal which is thus permitted finally to decide this question a direct motive and inducement to decide it against the railroad company, by offering to that tribunal as a reward for such decision, the legislative power to make the railroad company's rates for the future in the matter of the transportation involved.

II.

THE PLAN PROVIDED BY THE McCHORD ACT FOR ENFORCING THE RATES FIXED BY THE RAILROAD COMMISSION DEPRIVES THE RAILROAD COMPANIES OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW, AND DENIES THEM THE EQUAL PROTECTION OF THE LAW.

1. Certain principles as to the limitations imposed by the Constitution of the United States upon the power of State legislatures or State railroad commissions to make and enforce rates for railroad companies are now so well settled as to need no discussion.

In Smyth v. Ames, 169 U. S. 466, 526, the court, after referring to all its former decisions on the subject, said:

> "In view of the adjudications, these principles must be regarded as settled:
>
> "1. A railroad corporation is a person within the meaning of the Fourteenth Amendment declaring that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.
>
> "2. A State enactment, or regulations made under the authority of a State enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as under all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws, and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States.

"3. While rates for the transportation of persons and property within the limits of a State are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, can not be so conclusively determined by the legislature of the State or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In Chicago, Milwaukee, etc., R'y v. Tompkins, 176 U. S. 167, the court said:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws and not of men; and by this court, in Yick Wo v. Hopkins, 118 U. S. 356, 369: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

If the question of the reasonableness of the rates of a railroad company can not be so conclusively determined by the legislature of a State, or by regulations adopted under its authority, as that the matter may not become the subject of judicial inquiry, and

if railroad companies have a right of appeal to the courts for the determination of this question, and the right to invoke such judicial inquiry and protection is guaranteed by the Constitution of the United States, then clearly if an act be so framed as to destroy or evade such judicial supervision, that act must be held void if the guarantees of the Constitution of the United States are to be enforced. The McChord act is of this description.

2. By the McChord act the rate fixed by the commission shall be in full force and effect at the expiration of ten days after mailing a copy of the order fixing the same to any officer, agent, or employe of the railroad company, and if the company, or any officer, agent, or employe, shall charge a greater rate for like services, the company and its officer, agent, or employe, shall each be deemed guilty of extortion, and upon conviction shall be fined, for the first offense not less than five hundred dollars nor more than one thousand dollars, upon a second conviction not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions not less than two thousand dollars nor more than five thousand dollars. It is clear from the language of the act that if the railroad company does not reduce its rate, as required by the railroad commission, and an indictment be found against it for charging a higher rate, the only question in the case is the simple question of fact, whether the company has charged a greater rate than the commission has fixed. From the express and unmistakable language of the act it necessarily results that the rate fixed by the commission must be enforced by the imposition of heavy penalties, and without any opportunity for the railroad company to show that the rates so fixed are unreasonably low.

In Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, the State attempted to compel the railroad company to observe the rates fixed by the commission by issuing a writ of mandamus, and denying to the railroad company the right in that proceeding to

question the reasonableness of the rates fixed by the commission. Under the McChord act the State attempts to compel the railroads to observe the rates fixed by the commission by means of prosecutions, wherein the railroad company has no opportunity to demonstrate the unreasonableness of the rate. The cases, therefore, seem exactly parallel, and the McChord act is in conflict with the Constitution of the United States, as was the Minnesota act.

The question thus presented, whether an act providing for the enforcement of rates fixed by a railroad commission through the exclusive means of prosecutions and penalties, thus depriving the carrier of an opportunity to invoke judicial protection against unreasonably low rates, is in conflict with the Constitution of the United States, has not been decided by this Court.

In the case of Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, this Court expressly declined to pass on the constitutionality of the section of the Texas act whereby it was sought to enforce the commission's rates by penalties, and also declined to pass on the question of the constitutionality of that section of the Texas act providing that until set aside in a direct proceeding for that purpose, the rates made by the commission should be deemed conclusive in all actions between private individuals and the companies. The Court pointed out that these two provisions were separable from the rest of the act, as there were many important provisions of the act which could be enforced independently of these provisions, and that, therefore, the rest of the act could stand without them, and said:

> "We, therefore, for the purposes of this case, assume that these two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration."

In the case at bar the question as to the constitutionality of a statute prescribing only penalties for the enforcement of the rates of a railroad commission is directly involved, and if such

a scheme standing alone is unconstitutional, then this act as a whole must fall to the ground, because in this act the provision as to penalties can not be separated from the rest of the act, for all the rest of the act was obviously intended merely as a basis for the penalties.

As already stated, the Court of Appeals of Kentucky, in the case of L. & N. R. R. Co. v. Commonwealth, 99 Ky. 132, held that a criminal prosecution could not be maintained against a railroad company for extortion. The McChord act was passed for the avowed purpose of supplying that defect, and of authorizing the enforcement of the statute as to extortion by means of criminal prosecutions. An examination of the act will show that, aside from the procedure outlined before the commission with a view of divesting the railroad company of power to make rates in particular instances, and lodging that power in the railroad commission, the act deals with nothing but prosecutions. Section 1, which provides the steps necessary to vest the commission with the power to make rates, and the steps necessary in order that the rates made by the commission shall go into effect, provides nothing further except very heavy penalties for not charging the rates fixed by the commission. Section 2 provides solely what courts shall have jurisdiction of the *prosecutions* against the railroad company and against its officers, agents, and employes. Section 3 provides merely that "*prosecutions* under this act shall be by indictment." Section 4 provides merely a limitation of two years within which *prosecutions* shall be commenced. Section 5 deals merely with one of the details of procedure before the commission, and authorizes the commission to take depositions. The letter and the spirit of this act are "prosecutions" and nothing else.

The penalty prescribed for a violation of Section 816, Ky. Stats. (which section was held not enforcible as a criminal statute in L. & N. R. R. Co. v. Commonwealth, already referred to), was provided for by Section 819, Ky. Stats., which reads as follows:

"Any railroad corporation that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars nor more than five thousand dollars. The circuit court of any county into or through which the line or railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

It will be observed that Section 819 not only provided for a prosecution and denounced penalties against the railroad company guilty of extortion, but it also provided that the railroad company should be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees, and prescribed a limitation both for prosecutions and actions. The McChord act, however, provides for no civil action, nor does it provide for any limitation for civil actions. It deals exclusively with penalties and prosecutions, and inasmuch as the method of enforcing the Commission's rates by prosecutions, wherein no opportunity is afforded for questioning the reasonableness of those rates, is in conflict with the Constitution of the United States, the whole act must fall.

3. Appellants' counsel do not seriously controvert the proposition that the imposition of a penalty for failing to charge the rate fixed by the commission without opportunity to show that that rate is unreasonably low makes that method of enforcement subject to the constitutional objections which we urge, and which in Chicago, etc., R'y Co. v. Minnesota, 134 U. S. 418, were held fatal to the method of enforcement by mandamus which excluded inquiry into the reasonableness of the rates. But they argue that if the Supreme Court of Minnesota had construed the Minnesota act as authorizing the court upon the trial of the mandamus proceeding to entertain an inquiry as to the reasonableness of the rates, then this Court would not have declared the Minnesota statute or the method of its enforcement unconstitutional. And they claim that the Kentucky Court of Appeals may hold that upon the trial of an indictment for failure to observe the rate made by the commission the court may entertain a similar inquiry as to the reasonableness of the rate, and that such holding would make the McChord act constitutional.

The first objection, however, to this suggestion is that such a construction is wholly unwarranted by the language of the statute, and while if the Court of Appeals of Kentucky had actually disregarded all rules of construction and had indulged in a piece of judicial legislation by so changing the McChord act as to conform to the theory advanced by appellants' counsel, that construction might possibly be regarded as binding upon this Court, clearly this Court should not indulge the presumption that the Court of Appeals of Kentucky will thus invade the domain of the legislative department, but it must assume that the court would place a construction upon the act not inconsistent with its plain terms.

There is nothing in the language of the McChord act which can be distorted into supporting the theory that the legislature intended any such inquiry into the reasonableness of the commission's rates in the prosecutions provided against the railroad

companies and their employes. The legislature expressed its intention in the simplest, clearest language. It provided that if the railroad company, or its officer, agent, or employe should charge a greater rate than that fixed by the commission, the company and its officer should each be deemed guilty of extortion, and upon conviction should be fined in the sums mentioned in the act, varying from five hundred to five thousand dollars. There is no room here for construction. If the company or its agent charge for any shipment more than the rate fixed by the commission, the penalty attaches. There is absolutely nothing in the act to indicate that the legislature intended that each jury which tried an indictment should not only try the violation of the rate fixed by the commission, but should also try the legality of that rate. The uncertainty and confusion which would result from any such method of enforcing the penalties reinforces the conclusion that the legislature could not have intended any such consequences. Manifestly the legislature intended that which its simple and direct language necessarily means.

In United States v. Reese, 92 U. S. 214, the Court said:

> "We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. *The proposed effect is not to be attained by striking out or disregarding words that are in the section, but by inserting those that are not now there.* Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

"It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings must, annul its encroachment upon the reserved power of the States and the people.

"To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one. This is no part of our duty."

In the Trademark Cases, 100 U. S. 82, the Court said:

"While it may be true that when one part of a statute is valid and constitutional, and another part is unconstitutional and void, the court may enfore the valid part where they are distinctly separable so that each can stand alone, it is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear in order that crimes may be punished which are not described in language that brings them within the constitutional power of that body."

And after quoting from United States v. Reese, *supra*, added:

"If we should, in the case before us, undertake to make by judicial construction a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trademark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law."

In Spraigue v. Thompson, 118 U. S. 90, the question was whether Section 1512 of the Code of Georgia relating to pilotage was valid in view of the fact that it contained provisions in

conflict with Section 4237 of the Revised Statutes of the United States. The Court said:

> "The section of the Georgia Code, above quoted, does contain such discriminations as are prohibited by Section 4237, Rev. Stat. It excepts from its operation 'coasters in this State,' and 'between the ports of this State and those of South Carolina,' and 'between the ports of this State and those of Florida.'
>
> "It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separate part of a statute, which is unconstitutional, may be rejected, and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the legislature never meant. It confers upon the statute a positive operation beyond the legislative intent, and beyond what any one can say it would have enacted in view of the illegality of the exceptions. We are, therefore, constrained to hold that the provisions of Section 1512 of the Code of Georgia can not be separated so as to reject the unconstitutional exceptions merely, and that the whole section must be treated as annulled and abrogated by Section 4237 of the Revised Statutes."

For the court to attempt to qualify the McChord act by putting aside its express language relative to prosecutions and substituting therefor another method of procedure, in order to make the act conform to the Constitution of the United States, would be a direct violation of the principle illustrated by the cases just cited, and by inserting words not in the statute would give an effect to it radically different from that clearly indicated by its plain language. If such judicial amendment should be permitted in this case, then it is difficult to see how any statute could ever be held to be in conflict with any constitution, for the court could redraft it so as to meet the court's views as to the constitutional requirements, and so as to express the

court's views as to what the legislature would have enacted if it had been properly advised.

But here we are not left to mere surmise as to whether such a modification of the act would have been agreeable to the legislature. The McChord act originated in the Kentucky Senate. When it was sent to the House of Representatives it was referred to the Committee on Railroads. That committee reported the bill back to the House and proposed six amendments thereto, which read as follows:

> "1. Amend section 1, line 2, after the word 'made,' the words 'in writing.'
>
> "2. Amend section 3 by adding, after the words 'prosecution under this act shall be indictment,' the words 'upon information filed before the grand jury by the Railroad Commission, or any member thereof, and the defendant shall be permitted upon trial to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll, or compensation.'
>
> "3. To amend section 2 by striking out after the word 'officer,' in line 7 thereof, the words 'agent or employe.'
>
> "4. Amend section 1, line 11, by inserting after the word 'same' the words, 'And shall hear and reduce, or cause to be reduced to writing, all evidence adduced by the parties, and such other evidence as they may desire to hear.'
>
> "5. Amend section 1 by striking out after the word 'officer,' in line 28 thereof, the words 'agent or employe.'
>
> "6. Amend section 1 by inserting in line 18 thereof, after the word 'rendered,' the following words: 'Provided, That said commission shall not by any rate, toll or compensation which it shall make and fix under this act give to any railroad corporation an undue or unreasonable preference, or give any undue or unreasonable preference to any individual, company, firm or locality located on the line of any railroad doing business in this Commonwealth.'" (House Journal, 1900, pages 533, 534.)

These amendments were rejected (House Journal, 1900, pages 537, 538, 539), and the bill was passed without amendment (House Journal, 1900, page 541). The legislature thus evinced unmistakably its intention that the rates fixed by the railroad

commission should be regarded as conclusive and enforced accordingly by the imposition of heavy penalties. The portions of the House Journal referred to are set out in Appendix III.

4. But even if the language of the McChord act warranted the construction that upon the trial of an indictment for charging a higher rate than that fixed by the commission the defendant might question the reasonableness of that rate, the case would still be essentially different from what the Minnesota case would have been if the State court had construed the Minnesota act as authorizing the court in the mandamus proceeding to investigate the reasonableness of the commission's rates. Such an opportunity for judicial investigation and protection upon the trial of the mandamus proceeding would be substantial and adequate. If the railroad company failed in its attempt to demonstrate the unreasonableness of the rate of the commission, the result would be the natural and just one of requiring the company to conform to that rate for the future. No penalty would be imposed upon the company for having presumed to seek in this statutory manner the judicial protection guaranteed to it by the Federal Constitution. But a judicial investigation as to the reasonableness of the commission's rate, upon the trial of an indictment, is purely illusory and absolutely worthless. If the railroad commission makes a rate which the railroad company conceives is unreasonably low, and the company seeks in pursuance of the method prescribed by the McChord act to question the reasonableness of the rate, it must simply decline to observe that rate. Of course hundreds, and perhaps thousands, of shipments on which the McChord act requires it to charge not exceeding that rate will pass over its road in a very short period. The Company may be indicted many times in every county in the State through which its line runs, and in Franklin county whether its line runs through that county or not. In view of the fact that the Commonwealth's attorneys in Kentucky get fifty per cent of fines, there will be no doubt as to the promptness and frequency with which the

railroad company will be indicted. Upon the trial of those indictments before juries, and in accordance with the ordinary criminal procedure, the railroad company would be given, according to contention of the appellants' counsel, the right of laying before the jury the complicated and intricate details of its operations and earnings for the purpose, if possible, of convincing the jury that the rate fixed by the railroad commission is unreasonably low. If in any case it succeeds in establishing this fact, it is simply relieved from the penalty for that one shipment. The rate still exists as a constant invitation to further indictments, and the company can have no assurance that the next jury may not decide on the same evidence that the rate is unreasonable. If in any case the company fails to satisfy the jury that the rate is unreasonably low, the result is not to require the railroad company to charge that rate for the future, or to furnish it with any certain guide as to whether it should do so, but is to impose upon it a very heavy penalty for its having done the only thing it could do in order to bring about a judicial hearing in the statutory method, *i. e.*, refraining from charging the rate fixed by the commission. Surely if a railroad company has any real constitutional right to a judicial investigation as to the reasonableness of rates fixed by a commission, this sort of procedure is the veriest travesty upon justice. A favorable decision gives the company no protection for the future; an unfavorable decision imposes a heavy penalty upon it for having invoked judicial protection.

As a practical matter, therefore, the right, even if it exists, to have an inquiry upon the trial of an indictment into the reasonableness of the commission's rate, would be absolutely worthless to the railroad company. The questions involved are so intricate, the results of jury trials, even of cases of the greatest simplicity, are so uncertain, and the penalties imposed are so severe that no railroad company could afford to refuse to comply with any rate which the commission might make, and the result of the act, with any such construction, would be exactly what

was the obvious purpose of the legislature—and that is, that the railroad companies should be compelled to charge the rates imposed by the commission, no matter how low they might be.

In Chicago, Milwaukee, etc., R'y v. Tompkins, 176 U. S. 167, this court said:

> "Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. . . . When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clause of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state, or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated."

After discussing the findings of the lower court in that case the Court said:

> "We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had. The writer of this opinion appreciates the difficulties which attend a trial court in a case like this. In Smyth v. Ames, *supra*, a similar case, he, as Circuit Judge presiding in the Circuit Court of Nebraska, undertook the work of examining the testimony, making computations, and finding the facts. It was very laborious, and took several weeks. It was a work which really ought to have been done by a master. Very likely the practice pursued by him induced the trial judge in this case to personally examine the testimony and make the findings. We are all of opinion that a better practice is to refer the testimony to some competent master, to make all needed computations, and find fully the facts. It is hardly necessary to observe that in view of the difficulties and importance of such a case it is imperative that the most competent and reliable master, general or special, should be selected, for it is not a light matter to interfere with the legislation of a State in respect to the prescribing of rates, nor a light mat-

ter to permit such legislation to wreck large property interests."

It surely can not be that a railroad company's constitutional right to a judicial investigation into the sufficiency of rates prescribed for it by a commission is satisfied by permission to submit to juries in criminal proceedings questions of such complicated and delicate character, especially when that permission is coupled with the assurance that if the jury does not accept the railroad company's theory, then the company is to be subjected to most excessive penalties because it has chosen to question the correctness of the rates.

The case would not be simplified by the fact that perhaps only one rate at a time would be made by the commission or involved in an indictment. On the contrary, the difficulties of the investigation would be much increased, for it is obviously easier to consider an entire body of rates within a State and decide what their effect will be upon a railroad company than to say that any change in any single rate will violate the railroad company's constitutional rights. Indeed, this seems another of the evidences which are afforded on every hand that the McChord act was designed to eliminate entirely any practical opportunity for the railroad companies to have judicial protection. On account of the interdependence of all rates, the scope of the inquiry as to the reasonableness of any particular rate would perhaps be as extensive as an inquiry as to the reasonableness of an entire body of rates, and there would be the additional embarrassing circumstance, that it could always be argued that even though the particular rate might be so low as to be unremunerative, still it could not be presumed that the Commission would change additional rates so as to make the company's business as a whole unremunerative, and that therefore there was no taking of property without due process of law.

Assuming that the railroad company can show to the jury on the trial of the prosecution that the commission's rate is

unreasonably low, the case amounts to this: That the railroad company is guilty of extortion unless it can convince the jury that the rate fixed by the commission is unreasonably low. No standard is prescribed as to what is a reasonably low rate. The railroad company's escape from the penalty, therefore, depends exclusively upon the jury's conclusion as to what amounts to an unreasonably low rate. In this aspect the case is the exact counterpart of the case of L. & N. R. R. Co. v. Commonwealth, 99 Ky. 132, where it was held that to impose a penalty upon a railroad company for charging a rate greater than a jury might think was just and reasonable would be to deprive the company of its property without due process of law, in violation of both State and Federal Constitutions. Clearly just the same uncertainty will exist, and injustice result, if the railroad company is permitted to be fined under the McChord act, even though it may be permitted to attempt to convince the jury that the rate fixed by the commission is unreasonably low. In the case cited, in referring to Sections 816 and 819, Kentucky Statutes, already quoted, the court said:

> "That this statute leaves uncertain what shall be deemed a 'just and reasonable rate of toll or compensation' can not be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.
>
> "The *criminality* of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.
>
> "That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant

to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

"If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

It may be said that the rate fixed by the railroad commission is the standard, but this necessarily begs the question, when we are considering whether the railroad company is afforded by the act a fair opportunity to question the correctness of that so-called standard. It necessarily results that when this standard is put on trial the jury is left without any standard to guide it, and the railroad company's subjection to or escape from the heavy penalties of the act depends solely on the jury's view as to what is a reasonable rate, so that the company can never know when it is committing a crime.

In United States v. Reese, 92 U. S. 214, the Court said:

"Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

Inasmuch as the McChord act has made no provision for an antecedent opportunity on the part of the railroad company to invoke the judicial inquiry to which it is entitled before imposing penalties, then if it be held that this judicial inquiry may be had upon the trial of the prosecution, then clearly the company can not know with certainty when it is committing a crime, and to subject it to penalties under such circumstances is to make the act in conflict with both the State and Federal Constitutions

in the respects indicated by the Court of Appeals of Kentucky in L. & N. R. R. Co. v. Commonwealth.

5. Not only does the sole method prescribed in the McChord act for enforcing the commission's rates deny the railroad companies that judicial investigation to which they are entitled, but it is necessarily inconsistent with and defeats any other method to which otherwise the railroad companies might attempt to resort, as by way of a bill in chancery, and the act seems to have been studiously devised so as to accomplish this complete evasion from judicial scrutiny.

Appellants' counsel lay special stress on the fact that by the McChord act the commission is not charged with the enforcement of the rates which it fixes; that after the commission makes a rate, it has nothing further to do with the subject. Under Section 819, Ky. Stats., hereinbefore quoted, indictments against the railroad company for extortion could be found only upon the recommendation of the railroad commission. This supervisory control over indictments is taken away by the McChord act, and, although it was proposed in the House to amend the act by providing that indictments should be upon the recommendation of the railroad commission, or of some member thereof, the amendment was rejected. This was evidently done with the deliberate purpose of frustrating any interference with the enforcement of any rates made by the commission by injunction or otherwise.

Under the McChord act, when the Commission makes a rate, and mails a copy of its order to any employe of the railroad company, its connection with the matter ceases, and ten days from the time that letter is mailed it becomes a crime, punishable by heavy penalties, for the railroad company to charge more than the rate so fixed. Obviously, if the rate is unreasonably low, there is no one whom the company can enjoin so as to prevent the enforcement of the rate.

We think it is clear, therefore, that the McChord act renders it absolutely impossible for the railroad company in any manner

by a bill in equity or otherwise, to secure the judicial protection to which it is entitled under the Constitution of the United States.

In Fitts v. McGhee, 172 U. S. 516, 531, it is settled that the courts are without jurisdiction to enjoin the officers of the State from instituting and prosecuting criminal proceedings in the State courts under an act which charges them with no special duty in connection with it. If the commission, therefore, once fixes a rate under the McChord act, there will be nobody to enjoin, and the only hearing in court which a railroad company could secure will be in defending indictments, and for the purpose of showing that a rate fixed by the commission is unreasonably low. This opportunity for a hearing in court would be the merest pretense and sham, and utterly without practical value, as has already been shown, even if under the McChord act the court should on the trial of the indictment go into the question of the reasonableness of the rate fixed by the commission.

But we conceive that the unconstitutionality of the act does not have to rest upon the fact that the act precludes all possibility of judicial protection in any direction, for where the only method of enforcement prescribed by the act itself is of such a character as to deny absolutely the opportunity therein for such judicial investigation as the railroad company has the right to demand, then clearly that method of enforcement must be unconstitutional, whether there may be an independent procedure or not; otherwise the case of Chicago, etc., Railway Company v. Minnesota, 134 U. S. 418, was incorrectly decided, for there the Court held that the act as construed by the Supreme Court of Minnesota was in conflict with the Constitution of the United States, because it failed to afford the railroad company an opportunity *in the statutory proceeding for enforcing it* to show the unreasonableness of the rates fixed by the commission. In that case it appeared that the commission fixed the rates on milk on August 4, 1887, and published the tariff on October 14, 1887, and did not take steps for the writ of mandamus until December

6, 1887. The railroad company had had, therefore, ample opportunity to resort to relief by way of injunction if it had chosen to do so. It elected not to do so, but to test the matter in the statutory procedure for enforcing the rates.

This Court held, because that procedure did not afford the judicial investigation to which the railroad company was entitled, the act was in conflict with the Federal Constitution. In precisely the same way we contend that the railroad companies, under the McChord act, have the right to await the statutory method for enforcing the rates fixed by the commission, and if that method does not afford the judicial investigation to which the companies are entitled, that method is necessarily in conflict with the Federal Constitution.

Clearly, if the legislature prescribes a method of enforcing rates fixed under its authority, it must not ignore the vital principle that the railroad company is entitled to judicial protection, and must not adopt a system of enforcement which amounts to coercing the company into charging the rates fixed by the commission in a proceeding which for all practical purposes denies the judicial investigation which the company has the right to demand.

6. The principles for which we contend do not at all militate against the fair and reasonable regulation of railroad rates by railroad commissions. The application of these principles would not involve the validity of any other railroad commission act in the United States. The McChord act is unique in that it alone has singled out the one method of enforcement of rates made by a railroad commission which necessarily completely ignores the railroad company's constitutional rights. Other acts may likewise provide penalties, but they are comprehensive acts of regulation, like the Texas act involved in Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, and in which, as this Court pointed out, the provision as to penalties may be disregarded, and yet the useful features of the act retained.

In many of the railroad commission laws of this country, such, for instance, as that of Louisiana (Constitution of Louisiana, Sections 283 to 289); North Carolina (act of the General Assembly of North Carolina of March 6, 1899); Nebraska (Section 4061, Compiled Statutes of Nebraska of 1897); Minnesota (Chapter 10, General Laws of 1887); and Texas (Act of April 3, 1891), express provision is made for judicial review, while the acts in other States require or authorize proceedings by way of mandamus or injunction by the railroad commission to enforce the rates fixed by them, wherein the carrier may be given a practicable and fair opportunity to secure the judicial investigation to which it is entitled, and not another act, so far as we have been able to find, has devoted itself entirely, as does the McChord act, to an attempt to provide the machinery for the imposition of heavy penalties against the railroad company. The McChord act seems to be the only instance where legislative regulation of this character has been directed not to a fair and comprehensive treatment of this most important subject, but to a deliberate attempt to harass the railroad companies by the imposition of heavy penalties without the opportunity for judicial investigation of those questions which under the Constitution of the United States the railroad companies are entitled to have passed upon by the courts.

III.

A Court of Equity Has Jurisdiction of These Actions.

A considerable part of the brief for the Railroad Commissioners is devoted to a discussion of the question as to whether equity has jurisdiction of such a case as this; or, in other words, whether there is any right to enjoin the Railroad Commission from proceeding under the terms of this act.

It is admitted that if the legislature or a commission fixes a rate or rates, then the carrier or other public servant whose rates are thus fixed can, if they are unreasonable or confiscatory in their character, come into a court of equity and enjoin the Railroad Commission, or such other public official as has the duty imposed upon him to enforce such rates, from so doing. But, it is said, that where the duty simply rests upon the commission to fix the rate, and there is no duty upon it to enforce the rate, then there is no remedy at all in a court of equity; no remedy by way of injunction against the commission from enforcing the rate, because no duty is imposed upon it by law to enforce such rate, and no remedy against the Commission making the rate, because in making the rate the action of the commission is legislative in its character.

The effect of this argument in such a case as the one at bar is, therefore, that it is competent for the legislature to pass an unconstitutional law, giving to such a body as a railroad commission the right to fix a rate or rates, and making the rate or rates thus fixed conclusively binding upon the carrier, and yet, because the legislature does not confide in any particular commission or official the duty of enforcing these rates, but prescribes penalties for their violation, the carrier is without any remedy except such as it may have in defending a prosecution brought for its violation of the rate so fixed.

Certainly counsel for the appellants have cited no case holding this doctrine. Nor do we believe that such can be the law.

We admit that the fact that an act is unconstitutional does not, by itself, give a court of equity jurisdiction to enjoin its execution. In Cruikshank v. Bidwell, 176 U. S. 73, this court says:

> "It is settled that the mere fact that a law is unconstitutional does not entitle a party to relief by injunction against proceedings in compliance therewith, but it must appear that he has no adequate remedy by the ordinary processes of law, or that the case falls under some recognized head of equity jurisdiction."

That case was one of a bill filed by an importer to enjoin a receiving officer from detaining divers invoices of tea. This court held there was an adequate remedy at law, as the value of the tea was readily capable of being ascertained.

The cases illustrative of when the court will not and when it will take jurisdiction in equity cited in this case are substantially as follows:

Shelton v. Platt, 139 U. S. 591; Allen v. Pullman Palace Car Company, 139 U. S. 658.

These are cases where an effort was made, in the one, to enjoin the collection of a tax upon property of the United States Express Company, and in the other to enjoin the collection of a tax upon the property of the Pullman Palace Car Company by the authorities of Tennessee. No irreparable injury was shown; no multiplicity of suits threatened, and the act under which the taxes were being collected expressly provided that if the tax was paid under protest and wrongfully paid, it could be recovered back.

The case of Pacific Express Company v. Seibert, 142 U. S. 339, is also a tax case—an effort upon the part of the Pacific Express Company to enjoin the State of Missouri from levying certain taxes. There are general expressions in this case in regard to the jurisdiction. The case had no merit for the Express Company, and for that reason the dismissal of the bill was affirmed.

In Pittsburgh Railway Co. v. Board of Public Works, 172 U. S. 32, an effort was made upon the part of the State of West Virginia to assess for taxation a bridge. The owners of the bridge entirely failed to take any means to correct, before the Board of Assessment, the mistakes in assessment, or to pursue any other remedies given by the statute to prevent an unjust valuation. And this court held that under these circumstances a court of equity would have no jurisdiction.

In Arkansas Building & Loan Association v. Madden, 175 U. S. 269, it appeared that by paying the tax for doing business in the State—$250—the whole trouble could have been avoided, and that if the tax was unlawfully exacted the company could recover it back.

On the other hand, the cases of Union Pacific Railway Co. v. Cheyenne, 113 U. S. 516, and Smyth v. Ames, 169 U. S. 516, are referred to as illustrating the inadequacy of the remedy at law where the case made demands preventive relief; as, for instance, the prevention of a multiplicity of suits. The first of these cases was a bill filed by the Union Pacific Railway in which it was alleged that if the assessment was made upon its property it would be subjected to numberless suits along its line. The other case was a suit by various railroad companies to enjoin the Board of Railroad Commissioners of Nebraska from putting into effect the Nebraska rate law, and Mr. Justice Harlan fully points out the nature and ground of equity jurisdiction in such a case, resting upon the danger of a multiplicity of suits. We quote as follows:

> "The first question to be considered is one common to all the cases. While it was not objected at the argument that there had been any departure from the 94th Equity Rule, it was contended that the plaintiffs had an adequate remedy at law, and that the Circuit Court of the United States, sitting in equity, was therefore without jurisdiction. This objection was based upon the fifth section of the Nebraska statute authorizing any railroad company to show, in a proper action brought in the Supreme Court of the State,

that the rates therein prescribed are unreasonable and unjust, and if that court found such to be the fact, to obtain an order upon the Board of Transportation permitting the rates to be raised to any sum in the discretion of that Board, provided that in no case should they be fixed at a higher sum than was charged by the company on the first day of January, 1893. This section, it is contended, took from the Circuit Court of the United States its equity jurisdiction in respect of the rates prescribed, and required the dismissal of the bills.

"We can not accept this view of the equity jurisdiction of the Circuit Courts of the United States. The adequacy or inadequacy of a remedy at law for the protection of the rights of one entitled upon any ground to invoke the powers of a Federal court, is not to be conclusively determined by the statutes of the particular State in which suit may be brought. One who is entitled to sue in the Federal Circuit Court may invoke its jurisdiction in equity whenever the established principles and rules of equity permit such a suit in that court; and he can not be deprived of that right by reason of his being allowed to sue at law in a State court on the same cause of action. It is true that an enlargement of equitable rights arising from the statutes of a State may be administered by the Circuit Courts of the United States. (Omitting authorities.) But if the case in its essence be one cognizable in equity, the plaintiff—the required value being in dispute—may invoke the equity powers of the proper Circuit Court of the United States whenever jurisdiction attaches by reason of diverse citizenship or upon any other ground of Federal jurisdiction. (Omitting authorities.) A party by going into a national court does not, this court has said, lose any right or appropriate remedy of which he might have availed himself in the State courts of the same locality; that the wise policy of the Constitution gives him a choice of tribunals. (Omitting authorities.) So, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another State may invoke the jurisdiction of the Federal Courts to maintain a like defense. A State can not tie up a citizen of another State, having property rights within its territory invaded by unauthorized acts of its own officers, to suits for redress in its own courts (omitting authorities).

"In these cases the plaintiffs, stockholders in the corporations named, ask a decree enjoining the enforcement of

certain rates for transporation upon the ground that the statute prescribing them is repugnant to the Constitution of the United States. Under the principles which in the Federal system distinguish cases in law from those in equity, the Circuit Court of the United States, sitting in equity, can make a comprehensive decree covering the whole ground of controversy and thus avoid the multiplicity of suits that would inevitably arise under the statute. The carrier is made liable not only to individual persons for every act, matter, or thing prohibited by the statute, and for every omission to do any act, matter, or thing required to be done, but to a fine of from one thousand to five thousand dollars for the first offense, from five thousand to ten thousand dollars for the second offense, from ten thousand to twenty thousand dollars for every subsequent offense. The transactions along the line of any one of these railroads, out of which causes of action might arise under the statute, are so numerous and varied that the interference of equity could well be justified upon the ground that a general decree, according to the prayer of the bills, would avoid a multiplicity of suits and give a remedy more certain and efficacious than could be given in any proceeding instituted against the company in a court of law; for a court of law could only deal with each separate transaction involving the rates to be charged for transportation. The transactions of a single week would expose any company questioning the validity of the statute to a vast number of suits by shippers, to say nothing of the heavy penalties named in the statute. Only a court of equity is competent to meet such an emergency and determine, once for all and without a multiplicity of suits, matters that affect not simply individuals, but the interests of the entire community as involved in the use of a public highway and in the administration of the affairs of the quasi-public corporation by which such highway is maintained."

The other illustrative case cited in Cruikshank v. Bidwell, *supra*, is Watson v. Sutherland, 5 Wallace, 74. That was a case where an effort was made to attach a certain stock of goods which had been purchased by a young merchant, and which he was using to carry on his trade, upon the ground that he had bought them fraudulently from an insolvent. The court held

that as it would have ruined his business to take away from him this stock of goods, the damage would have been irreparable, and therefore he was entitled to come into equity.

In L. & N. R. R. v. Railroad Commission of Tennessee, 19 Fed. Rep. 679, a bill like this was sustained upon the ground of the unconstitutionality of the Railroad Commission law; and the railroad commissioners were perpetually enjoined from attempting to execute it.

In Stone v. Farmers Loan & Trust Co., 116 U. S. 307, the Circuit Court entertained a bill similar in character to this, and this court, while reversing the decree of the Circuit Court, made no question upon the jurisdiction in equity if the cause had been a meritorious one.

In Reagan v. Farmers Loan & Trust Co., 154 U. S. 362, the Railroad Commission of Texas had, it is true, already fixed a schedule of rates, but the Circuit Court not only enjoined the commission and the Attorney General of Texas from enforcing this schedule of rates on the theory that they were unreasonably low, but it further enjoined the commission from making any further tariffs or orders, or discharging the duties imposed by the railroad commission act, on the theory that certain sections of that act were unconstitutional, and that their invalidity rendered the whole act void. This Court affirmed the decree of the Circuit Court enjoining the enforcement of the rates already made, on the ground that those rates were unreasonably low. It reversed so much of the decree as enjoined the railroad commission from discharging the duties imposed by the act, on the ground that, even conceding the unconstitutionality of the particular sections assailed, the rest of the act was constitutional, because separable from those provisions; but this Court made no question as to the jurisdiction in equity to restrain the commission from taking any steps under the act if the Circuit Court had been right in its view that the act as a whole was unconstitutional.

These seem to us to be cases precisely in point.

In Chicago & Northwestern Railroad v. Day, 35 Fed. Rep. 882, Mr. Justice Brewer, then Circuit Judge, points out the reasons for the remedy in equity. He says:

> "Equity interferes to prevent a multiplicity of suits, and where one act may be the foundation of many suits the courts have a right, and it is their duty in the first instance, to stay that act, if unlawful. Take this illustration: Suppose a board of assessors were charged with the duty of assessing property of the complainants, and that after such assessment was made an apportionment of the property between one hundred different townships was to follow; then warrants of collection to be issued and served by officers of these townships—if the property of the company was in fact exempt from taxation, would it be contended that it might not have injunction to stay the assessments rather than await to litigate with the one hundred different collectors the validity of their warrants? And in this case, beyond the mere matter of multiplicity of suits, is the fact that the penalties imposed are large, and while that of itself might not justify interference, it certainly adds force to the argument of multiplicity of suits."

A similar remedy in effect was allowed to the receivers of a railroad company against the railroad commissioners of South Carolina, who had endeavored to make a change in the rates for transportation of liquors in glass. (Clyde v. Richmond & Danville R. R., 57 Fed. Rep. 436.)

Again, in Southern Pacific Railroad Company v. Board of Railroad Commissioners, 78 Fed. Rep. 238, in a suit of the Southern Pacific Company against the Railroad Commissioners of California to enjoin them from putting into effect certain rates, a similar remedy was had.

So in Georgia Banking Company v. Smith, 128 U. S. 177, where the suit was to enjoin the Railroad Commission of Georgia from putting into effect certain rates, there being a penalty for violating the rates, and the complainant contending that it had a contract which would be impaired by such action, no question was made of the jurisdiction of the court or the propriety of the remedy, although the case was decided against the contract.

So in Cotting v. Kansas City Stock Yards Co., 79 Fed. Rep. 680, there was a suit to enjoin the putting into effect of certain rates prescribed by the legislature for services of stock yards. The suit was by certain stockholders, and the defendants were the Kansas City Stock Yards Company and the Attorney General of the State of Kansas. The court said:

> "There has been some discussion about the jurisdiction of this court but it is not seriously challenged, and the objection to the Attorney General that he is improperly made a party defendant is not well taken, as the court has jurisdiction to enjoin a State officer from enforcing an unconstitutional law."

It is true that in many of these cases the commission had put into effect certain rates, or at least prescribed them, which were alleged to be unreasonable or unlawful as inimical to a contract between the complainant and the State; but this was not made the ground or basis of the jurisdiction. On the contrary, the jurisdiction was rested upon the irreparable injury that would be suffered by the complainant either immediately from the conduct of the defendant or from such a result following from that conduct as a multiplicity of suits, and the danger of being subjected to a multiplicity of penalties.

We take the liberty of quoting quite extensively from the case of Bank of Kentucky v. Stone, 88 Fed. Rep. 390, because this case, with the others similar thereto and decided at the same time, all came to this Court and were reversed or affirmed without any challenge whatsoever of the jurisdiction of the court, although, in the brief of counsel for the State Board of Valuation and Assessment of Kentucky and of the City of Louisville, the jurisdiction was strongly assailed.

> "Taft, Circuit Judge (after stating the facts). The bill attacks the validity of the Kentucky revenue law of November, 1892, and seeks relief against its enforcement on the ground that, in its application to the complainant bank, it violates that clause of the Federal Constitution which forbids

a State to pass a law impairing the obligation of a contract. The case is therefore one arising under the Constitution of the United States, and, as it involves more than $2,000, it is within the jurisdiction of this court. Do the facts stated in the bill bring it within the equity jurisdiction of this court? It is well settled that in the federal courts an action in equity will not lie to restrain the collection of a tax on the sole ground that it is illegal and void, and independently of every other consideration. See Rich v. Braxton, 158 U. S. 375, 405. It must appear from the special circumstances averred that there is no adequate remedy at law, and that there is some recognized ground for equity jurisdiction, such as that the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury. Ogden City v. Armstrong, 168 U. S. 224, 236, 18 Sup. Ct. 98; Express Co. v. Seibert, 142 U. S. 339, 12 Sup. Ct. 250; Allen v. Car Co., 139 U. S. 658, 661, 11 Sup. Ct. 682; Shelton v. Platt, 139 U. S. 516, 525, 5 Sup. Ct. 601; Hannewinkle v. Georgetown, 15 Wall. 547; Dows v. City of Chicago, 11 Wall. 108. What are the remedies at law which the complainant has? If the collecting officers proceed to collect the tax by distraint, the bank may, under the duress of the threatened trespass, pay the taxes alleged to be illegal, and then sue the city of Louisville, the county of Franklin, and the city of Frankfort to recover them back. Railroad Co. v. Commissioners, 98 U. S. 541. It is to be observed, however, that no such action will lie except upon payment under duress. The bank could not simply pay under protest, and sue to recover back. Such a payment would be voluntary. There is no statute of Kentucky providing such a remedy, as there was in Tennessee in the case of Shelton v. Platt. The remedy of paying and suing to recover back in Kentucky exists only when the collecting officer resorts to distraint. But the collecting officers are not obliged to collect the taxes by distraint; they may resort to a simple suit at law for them. In that case the bank may defend on the ground of the invalidity of the law under which the taxes have been assessed. This remedy, except where the taxes are a cloud upon real estate, would ordinarily be adequate; but, under the provisions of the revenue law of November, 1892, we do not think it is. By that law, the bank, on failing to pay the taxes assessed, according to its provisions, within thirty days after notice from the collecting officer, is subjected to a penalty of 10 per cent,

and to a fine of $50 a day for every day of the delinquency, to be enforced by indictment or by civil action. It follows that the remedy of defending a suit at law for taxes under this revenue act is attended with the risk of being consumed in the reasonable litigation of the question of the validity of the tax. By bill in equity the bank may enjoin the assessment, and, pending the litigation, however long the delay, no fines or penalties can accrue against the unsuccessful litigant, because, by the terms of the act, they do not begin to accrue until thirty days after notice to pay has been given by the collecting officer. It is manifest that the remedy at law by defending a tax suit in such cases is attended with a great and oppressive burden of risk, which is absent in an action in equity. The remedy at law is therefore entirely inadequate. Smyth v. Ames, 169 U. S. 466, 518, 18 Sup. Ct. 418; Express Co. v. Seibert, 44 Fed. 315. It is no answer to say that the payment of the tax and the action to recover it back constitute an adequate remedy, because no such action will lie, as already explained, unless these is a distraint, actual or threatened, and the collecting officer, by not distraining, may wholly deprive the taxpayer of this remedy. Indeed, the counsel for the City of Louisville vigorously contends that the collecting officer in that city has no power to distrain for bank taxes. However this may be, it would seem clear that a court of equity will not withhold relief from a suitor merely because he may have an adequate remedy at law if his adversary chooses to give it to him. The remedy at law can not be adequate, if its adequacy depends upon the will of the opposing party. To refuse relief in equity upon the ground that there is a remedy at law, it must appear that the remedy at law is 'as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.' Boyce v. Grundy, 3 Pet. 210, 215; Sullivan v. Railroad Co., 94 U. S. 806, 811. And the application of the rule depends upon the circumstances of each case. Watson v. Sutherland, 5 Wall. 74, 79. . . . In addition to the suits for future taxes, there is also danger of harassing suits for fines and penalties which the law permits to be brought for each day's delay in the payment of the taxes after they have been demanded. We have no doubt that if the complainant shows that the act of November, 1892, violates an exemption secured to it by contract, it may have equitable relief."

The case of Fitts v. McGhee, 172 U. S. 516, is not opposed to this view. The court there held that the suit was against the State. The court said, in commenting upon the cases relied on by counsel for complainant, such as Poindexter v. Greenhow, 114 U. S. 270; Reagan v. Farmers Loan & Trust Co., 154 U. S. 362; and Smyth v. Ames, 169 U. S. 466:

> "Upon examination it will be found that the defendants in each of those cases were officers of the State, specially charged with the execution of a State enactment, alleged to be unconstitutional, but under the authority of which, it was averred, they were committing, or were about to commit, some specific wrong or trespass to the injury of the plaintiff's rights. There is a wide difference between a suit against individuals holding official position under a State, to prevent them, under the sanction of an unconstitutional statute, from committing by some positive act a wrong or trespass, and a suit against officers of a State merely to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the courts of the State. In the present case, as we have said, neither of the State officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement. If because they were law officers of the State, a case could be made for the purpose of testing the constitutionality of the statute, by an injunction suit brought against them, then the constitutionality of every act passed by the legislature could be tested by a suit against the Governor and the Attorney General, based upon the theory that the former, as the executive of the State, was, in a general sense, charged with the execution of all its laws, and the latter, as Attorney General, might represent the State in litigation involving the enforcement of its statutes."

This extract shows the wide difference between that case and the one at bar. For here the suit is to enjoin specified officials from exercising a specified power, upon the ground that the law conferring this power is unconstitutional and void, and the equitable jurisdiction rests upon the obvious consequence of the exercise of this unconstitutional mandate.

It would seem to be almost too plain for argument that these consequences are such as can not be compensated for by any suit which the railroads could bring after the commission had acted. For here the case just cited would meet us as a controlling authority against any suit to enjoin the prosecuting officers of the State from insisting upon the penalties incurred through our violation of the order made by the Railroad Commission, and as the Railroad Commission would, by the very terms of the statute, be *functus officio* as to that rate, there would be nothing for the railroad companies to do but submit to the hazard of being subjected to numerous public prosecutions and to the infliction of the extreme penalties denounced by this law.

It would seem, therefore, that no stronger case could be presented of the necessity for preventive relief and the interposition of an equitable tribunal in anticipation of irreparable damage.

We respectfully submit, therefore, that the objection to the jurisdiction of the court is not well founded.

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APPENDIX I.

Sections 816 and 819, Ky. Stats., referred to in the foregoing brief, together with the intervening sections, are as follows:

"SEC. 816. *Extortion—what is.* If any railroad corporation shall charge, collect, or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or for the use of any railroad car upon its track, or upon any track it has control of, or the right to use in this State, it shall be guilty of extortion.

"SEC. 817. *Discrimination—what is.* If any corporation engaged in operating a railroad in this State shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person a greater or less compensation for any service rendered in the transportation of passengers or property than it charges, demands, collects, or receives from any other person for doing for him a like and contemporaneous service in the transportation of a like kind of traffic, it shall be deemed guilty of unjust discrimination.

"SEC. 818. *Preference or advantage forbidden—rules defining same—quantity of freight.* It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic; or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage. When one or more car loads of freight shall be transported at the same time for different persons, and for each shipper a car load or more, such shipment shall be considered and taken as the same quantity of freight within the meaning of this law; and when less than a car load of freight, and over five thousand pounds are transported at the same time for different shippers, and for each shipper over five thousand pounds, such shipment shall be considered and taken as the same quantity of freight; and when over five hundred pounds and less than five thousand pounds are transported at the same time for different shippers, and for each shipper said quantity of freight, such shipment shall be considered and taken as the same quantity of freight.

"SEC. 819. *Penalty and damages for extortion—discrimination, preference — jurisdiction — duty of Commission — limitation.* Any railroad company that shall be guilty of extortion or unjust discrimination, or of giving to any person or locality, or to any description of traffic, an undue or unreasonable preference or advantage, shall upon conviction, be fined for the first offense in any sum not less than five hundred dollars nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand nor more than five thousand dollars. The circuit court of any county into or through which the line or railroad may run, owned or operated by the corporation alleged to be guilty as aforesaid, and the Franklin circuit court, shall have jurisdiction of the offense, which shall be prosecuted by indictment, or by action in the name of the Commonwealth, upon information filed by the Board of Railroad Commissioners; and such railroad corporation shall also be liable in damages to the party aggrieved to the amount of damages sustained, together with cost of suit and reasonable attorneys' fees to be fixed by the court. Indictments under this section shall be made only upon the recommendation or request of the Railroad Commission, filed in the court having jurisdiction of the offense; and all prosecutions and actions under this law shall be commenced within two years after the offense shall have been committed, or the cause of action shall have accrued."

APPENDIX II.

The Opinion of the Court of Appeals of Kentucky in Louisville & Nashville Railroad Company v. Commonwealth, 99 Ky. 132.

Judge Hazelrigg delivered the opinion of the Court:

The indictment in this case charges that the appellant "did unlawfully charge, collect, and receive from A. Vancleave & Co. the sum of $41.70 as toll or compensation for the transportation of a car load of coal, weighing 53,800 pounds, being at the rate of $1.55 per ton, from Pittsburg, Ky., to Lebanon, in Marion County, over the line of said railroad, a distance of —— miles, the said rate of $1.55 per ton for the said transportation of said coal being more than a just and reasonable compensation therefor, contrary to the form of the statute, etc."

A conviction followed, and from the judgment on the verdict of the jury for the sum of $500, the company has appealed.

Its complaints are that the statute prohibiting extortion by railroad companies, and providing a penalty therefor, prescribes no standard as to what is just and reasonable for the guidance of the corporation, and altogether fails to define what it may and what it may not do; that it is, therefore, void for uncertainty; that, even if the statute is valid, the indictment states no facts showing the appellant guilty of the offense charged, but only the conclusion of the pleader that the rate charged was more than a just and reasonable compensation.

It is also urged that the trial court erred in refusing to grant to appellant a change of venue upon the testimony heard, and in the admission of incompetent evidence; and it further insists that, on the facts of the case, the charge is reasonable and just, within the meaning of the statute, and especially so as the charge is within the rate allowed by the company's charter.

The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in Sections 816 and 819 of the Kentucky Statutes. The first named section reads as follows:

> "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or the use of any railroad car upon its track, or upon any track it has control of or has the right to use in this State, it shall be guilty of extortion."

Section 819 fixes the *penalty for the first offense* at not less than $500, nor more than $1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into or through which the road runs, and the Franklin circuit court, are given jurisdiction of the offense, the prosecution to be by indictment or action in the name of the Commonwealth, upon information filed by the board of railroad commissioners.

That this statute leaves uncertain what shall be deemed a "just and reasonable rate of toll or compensation" can not be denied, and that different juries might reach different conclusions on the same testimony, as to whether or not an offense has been committed, must also be conceded.

The *criminality* of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws.

In Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee, 16 Am. and Eng. R. R. Cases, 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter):

> "Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the

penalty is inflicted must be defined by the law-making power. The legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define, with reasonable certainty, what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence can not know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of four per cent, while another might acquit an accused who had demanded and received at the rate of six per cent, rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms."

The Supreme Court of the United States, in Railroad Commission Cases, 116 U. S. 336, refers to this Tennessee case and substantially approves it by distinguishing the case then before the court from the Tennessee case.

This case is also used to support the text in 8 Am. and Eng. Ency. of L. 935, where it is said:

"Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable, in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates, this is a question which is a proper one for a jury."

Mr. Justice Brewer, in the case of Chicago, etc., R. R. Co. v. Dey, 35 Fed. Rep. 866, had under consideration the provisions of a statute similar to the one we have before us, and while the statute was upheld, it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge then said:

"Now the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate, it shall be deemed a criminal and punished by fine, and that such a statute is too indef-

> inite and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

In Dwar. St. 652, it is laid down "that it is impossible to dissent from the doctrine of Lord Coke that acts of Parliament ought to be plainly and clearly and not cunningly and darkly penned, especially in legal matters." See also United States v. Sharp, Pet. C. C. 122; The Enterprise, 1 Paine, 34; Bish. St. Cr., Section 41; Lieb. Herm. 156.

And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against any one who should be guilty of "improper conduct," and a statute which makes it a "criminal offense to charge more than a reasonable rate."

The same learned judge, discussing the kindred subject of unreasonable differences in rates, in Tozer v. United States, 52 Fed. Rep. 917, said:

> "But in order to constitute a crime the act must be one which the party is able to know in advance whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

When we look to the other side of the question we find the contention of the State supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury. It is in fact a question of contract. Common carriers are "bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which they are authorized to engage." (94 U. S. 180.)

If this charge is more than is reasonable, there is a violation of the contract, and the suit of the person aggrieved is because of such violation.

In some States the shipper is entitled to recover double or triple the amount of the excess, but this does not change the nature of the action.

The nearest approach to an authority for the State's contention is a case in which the shipper sued the carrier, and is reported in Railroad v. Jones, 149 Ill. 361. There the first section of the act under consideration, of which our statute is a substantial copy, was attacked for want of certainty in defining the act of extortion, the contention being that the determination of what is a fair and reasonable rate must depend upon a variety of considerations, such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability as affected by the value of the articles carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.

The court said:

> "That the difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. . . . The first section of the statute is merely declamatory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire (Messenger v. Penn. R. R. Co., 31 N. J. L. 407), and the court was to judge of the reasonableness of the freight charges. . . . Undoubtedly the legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges (Dow v. Bridleman, 125 U. S. 680); but in the absence of statutory regulation upon the subject the courts must decide what is unreasonable."

As we have seen, the action was one by a shipper against the carrier, and was in the nature of a suit for damages for a breach of the contract. The court, however, made its meaning clear by references to and approving its former construction of the act as found in Railroad, etc., v. The People, 77 Ill. 443, and of that case said:

> "But we held in Railroad Co., etc., v. The People, that the first section of this statute should be construed in con-

nection with the eighth, and that the latter section, by providing for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each of the railroad corporations in the State, furnished a uniform rule for the guidance of the railroad companies. In that case we said: 'When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed.'"

As this Illinois section appears to have been substantially re-enacted here without, however, accompanying it with the provision for a standard, we quote the more freely from the Illinois court construing the section.

In the 77 Illinois case the court said:

"That section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be reasonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad in this state of uncertainty and danger, and exposed to such seeming injustice. . . . The eighth section provides how reasonable rates shall be ascertained; what they shall be; that the railroad and warehouse commissioners should make for each of the railroad corporations in the State a schedule of reasonable maximum rates, thus furnishing a uniform rule for the guidance of the railroad companies."

These authorities and the argument abundantly supporting them are sufficient. Other objections to the judgment below need not be discussed, as the one noted is fatal, and the statute can not be enforced as a penal statute.

It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law.

The judgment is reversed, with directions to dismiss the indictment.

APPENDIX III.

Extracts from House Journal, 1900, Relative to the McChord Act.

Mr. Hickman moved that said bill, together with the amendments proposed thereto by the Committee on Railroads and Commerce, be taken up for consideration from the orders of the day.

Said motion was agreed to.

The yeas and nays being required thereon by Messrs. Catron and Jarnagin, were as follows, viz:

. . . . . 58 yeas.
. . . . . 40 nays.

Said bill reads as follows, viz:

(The bill as here copied is in the same language as the McChord Act as passed, and is set out in full in the foregoing brief.)

The amendments proposed thereto by the said committee were as follows, viz:

1. Amend Section 1, line 2, after the word "made," the words "in writing."

2. Amend Section 3 by adding, after the words "prosecutions under this act shall be indictment," the words "upon information filed before the grand jury by the Railroad Commission, or any member thereof, and the defendant shall be permitted upon trial to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll or compensation."

3. To amend Section 2 by striking out after the word "officer," in line 7 thereof, the words, "agent or employe."

4. Amend Section 1, line 11, by inserting after the word "same" the words, "And shall hear and reduce, or cause to be reduced to writing, all evidence adduced by the parties, and such other evidence as they may desire to hear."

5. Amend Section 1 by striking out after the word "officer," in line 28 thereof, the words "agent or employe."

6. Amend Section 1 by inserting in line 18 thereof, after the word "rendered," the following words: "Provided, That said commission shall not by any rate, toll or compensation which it shall make and fix under this act, give to any railroad corpora-

tion an undue or unreasonable preference, or give any undue or unreasonable preference to any individual, company, firm or locality located on the line of any railroad doing business in this Commonwealth."

(House Journal, 1900, pages 530 to 534.)

The question was then taken on Amendment No. 1, above stated, and it was decided in the negative.

The yeas and nays being required thereon by Messrs. Klair and Jarnagin, were as follows, viz:

. . . . . 43 yeas.
. . . . . 55 nays.

The question was then taken on Amendment No. 2, as above named, and it was decided in the negative.

The yeas and nays being required thereon by Messrs. Klair and Orr, were as follows, viz:

. . . . . 45 yeas.
. . . . . 54 nays.

The question was then taken on amendments Nos. 3, 4, 5, and 6, as above named, and it was decided in the negative.

The yeas and nays being required thereon by Messrs. Slack and Heissman, were as follows, viz:

. . . . . 44 yeas.
. . . . . 55 nays.

Ordered that said bill be read the third time.

Said bill was read the third time by its title.

The constitutional provision as to the third reading of said bill at length being dispensed with.

The question was then taken on the passage of said bill, and it was decided in the affirmative.

The yeas and nays being taken on the passage of said bill in accordance with the provision of the Constitution, were as follows, viz:

. . . . . 56 yeas.
. . . . . 42 nays.

(House Journal, 1900, pp. 537 to 542.)

Nos 141 – 145
No. 396 & XAQO

Office Supreme Court U.S.
FILED
JAN 10 1901
JAMES H. McKENNEY,
Clerk.

Add'l Br. of Humphrey & Hines for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

Nos. 396, 397, 398, 399 AND 400.

Filed Jan. 10, 1901.

CHARLES C. McCHORD, JAMES F. DEMPSEY, AND JOHN C. WOOD, APPELLANTS,

versus

LOUISVILLE & NASHVILLE RAILROAD COMPANY, APPELLEE,

AND FOUR SIMILAR CASES.

ADDITIONAL BRIEF FOR APPELLEES.

A. P. HUMPHREY,
WALKER D. HINES,
For Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1900.

CHARLES C. McCHORD ET AL., *Appellants*,

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, *Appellee*.

AND FOUR OTHER CASES.

Nos. 396 to 400.

ADDITIONAL BRIEF FOR APPELLEES.

JURISDICTION.

1. These suits are based upon the theory that the McChord Act is as a whole unconstitutional.

2. Since by the McChord Act the Railroad Commissioners are charged with the special duty of carrying out its provisions to the extent of making rates, such suits against those Commissioners are not suits against the State.

3. If the McChord Act is unconstitutional and the action of the Commissioners under it would result in multiplicity of actions and prosecutions against the railroad companies, a Court of Equity has jurisdiction to enjoin the Commissioners from proceeding under the Act.

4. If the Act is unconstitutional by reason of its conflict with the Constitution of the United States, then the Courts of the United States have original jurisdiction of such suits, and the railroad companies have the right to ask those Courts to extend to them the protection afforded by the Constitution of the United States.

UNCONSTITUTIONALITY OF THE McCHORD ACT.

I.

Appellants' counsel lay stress on the statement that if an opportunity be afforded to a railroad company to question the reasonableness of a rate fixed by the Legislature or the Railroad Commission, before the failure to observe that rate becomes a crime, the railroad company is thus afforded a sort of "interregnum," which is denied to other citizens in the enactment of ordinary penal statutes. In this contention counsel lose sight of the distinction between a legislative act or an order of a railroad commission fixing a rate and an ordinary statute defining an offence and prescribing penalties. In the latter case there can be no question of discretion or reasonableness upon which the courts can pass, for the discretion rests solely with the Legislature. But when it comes to fixing the compensation which shall be made to a railroad company for the service afforded by it to the public, the courts then have a right to inquire into the reasonableness of that compensation. Certainly a railroad company has the right to be compensated for the services rendered by it to the public. The Legislature cannot require the railroad company to render such service free of charge. It can within constitutional limits regulate the amount of such compensation. At last it comes to the ownership by the railroad company of its property and the right to secure compensation for its use on the one hand, and a right by the Legislature to exercise a certain measure of control over the property of the railroad company to the extent of fixing the compensation which the public must pay in order to be entitled to use such property. Now surely there is a wide difference between that

sort of legislation under which are enacted laws fixing the rates to be paid by the public for the use of the railroad company's property and those laws by which the Legislature simply defines what shall be considered public offences, punishable by appropriate penalties, such as fine and imprisonment. In the one case the owner of the property is justly entitled to have the question of the proper limits of his ownership on the one side and the State's control on the other determined before some judicial tribunal, and is justly entitled to have this determination without being subjected to the hazard of incurring penalties which will destroy his interest in his property.

We admit that if, after there has been this opportunity of judicial inquiry, and it has been determined that the control asserted by the Legislature is within just limits, that it may properly visit the railroad company with appropriate penalties for further refusal to obey the legislative mandate. The legislative power of enforcing its will is then just as plenary as in other cases of violation of penal laws.

II.

It is clear and it is conceded by appellants' counsel that upon the trial of the indictment the determination of the reasonableness of the Commission's rate, if that question can be then inquired into, is wholly for the jury. Section 353 of the Criminal Code of Practice of Kentucky dealing with the subject of appeals in misdemeanor cases is as follows :

> "The judgment shall be reversed for any error
> "of law appearing on the record when, upon con-
> "sideration of the whole case, the Court is satisfied
> "that the substantial rights of the defendant have
> "been prejudiced thereby."

It is settled by the decisions of the Court of Appeals

of Kentucky that if there be any evidence to sustain a judgment of conviction that judgment will not be reversed on the ground that it is against the evidence.

86 Ky., 315; 92 Ky., 612.

The hopelessness of submitting a question of this character to the jury, and permitting it to go at large into an investigation of the history and financial condition of a railroad company, the nature and extent of its revenue and expenses, and the propriety of all the elements of each is such that the question has never to our knowledge been actually submitted to a jury even in a civil case, although it is a common law principle that there may be recovered from a carrier any excess charged by him over a just and reasonable rate.

In *Hutchinson on Carriers* (2d ed.), Section 447, it is indicated that if in any such action for any excess charge over a reasonable rate, a rate for that particular service has been established by usage, that rate must control, and it is clear that any other rule would lead to the utmost confusion.

The impossibility of submitting a question of this character to a jury has been pointed out in *Louisville and Nashville Railroad Company* v. *Railroad C mmission of Tennessee*, 19 Fed. Rep., 679. The Court discussed this general question with reference to a statute making it a criminal offence to charge more than a just and reasonable rate. After pointing out that the Act recognized the railroad company's right to a fair return on the value of the railroad as assessed for taxation, the Court said:

> "Suppose the value satisfactorily ascertained, "how and upon what basis are the net earnings to "be computed? Is the estimate to be based upon "past receipts, current income or anticipated earn-"ings? Is the accused corporation to be held to

"anticipate its future operations, foresee the "amount of its receipts and expenditures, and ac- "curately foreknow its future profit and losses, so "as to be able to strike a balance in advance of "actual results in order to make its charges con- "form to the requirements of the statute? If so, "how far into the future must their knowledge "extend? These are some of the many difficulties "with which railroad companies are to be em- "barrassed, and against which the Act requires "them to provide. But we will suppose these to "have been successfully surmounted, and another "and more obstinate problem remains. These cor- "porations are, in addition to their expenses, "allowed to charge at a rate that will insure a "'fair and just return' on the value of their prop- "erty. But what is a fair and just return? This "vital question is by the Act left to the unquali- "fied and unrestrained discretion of the jury. "There is no legal standard erected whereby the "jury can measure the amount. One jury may fix "it at two or three per cent per annum, while "another jury may, in view of business contingen- "cies and fluctuating values, allow 6, 8 or 10 per "cent, and their action would be so far conclusive "as to be beyond the revision of any reviewing "court. The facts that the jury are to determine "are, first, the net earnings; and secondly, what "would be a fair and just return? The ascertain- "ment of net earnings involves necessarily an "inquiry into the gross receipts and expenditures. "May the jury revise the expense account, and if "so, to what extent? Both the earnings and ex- "penses vary in accordance with the exigencies of "business. Are rates to be varied in accordance "with the fluctuating fortunes of railroad opera- "tions? If so, a charge reasonable in itself and "honestly made might be rendered extortionate, "and hence criminal, by a reduction of expenses "or an unexpected increase of busines, or a charge "honestly made on the supposition that 5 or 6 per "cent would be fair and just, might be converted

"into a crime by the verdict of a jury subse-
"quently rendered, based, it may be, upon facts
"transpiring subsequent to the alleged violation of
"the law."

In *Winsor Coal Company* v. *Chicago & A. R. Co.*, 52 Fed. Rep., 716, the Court pointed out that the Legislature had established maximum rates, and had provided for the further fixing of rates by the Railroad Commission, and held that an action could not be maintained for the excess over a just and reasonable rate when the rate charged did not exceed the rate fixed by the statute or by the Commission, and said:

"What in the judgment of one jury n one lo-
"cality would be an unreasonable charge might in
"the opinion of another jury in another locality be
"quite reasonable. With the known capricious-
"ness of jury verdicts, influenced often by indi-
"vidual peculiarities, mental habits, the quantum
"and quality of the evidence in the particular case,
"how would it be possible to carry out the legis-
"lative intent to establish and maintain a uniform
"rate of charges? Would not the diversity of
"conclusions reached by different juries between
"different litigants in and of itself bring about
"discrimination and inequality? Under such a
"construction of this statute as contended for by
"plaintiff it is not apparent how any railroad com-
"pany could safely do business in the State. Its
"agents could never know when they were safe in
"any charge by them made. After a schedule of
"rates has been approved and published, the statute
"makes it unlawful for the carrier to charge less
"than the scheduled rate, under the pains and pen-
"alties prescribed in the act; and yet, under plain-
"tiff's theory the common carrier might be liable
"for the penalty of triple damages because it did
"not charge a lesser rate."

In *Van Patten* v. *Chicago &c., Railway Co.*, 81 Fed. Rep., 545, the Court held that a shipper could not main-

tain an action against a carrier for charging an unjust and unreasonable rate when the carrier had charged only the schedule rate published and filed in accordance with the Interstate Commere Act, and said that if such an action could be maintained,

> "It results in the holding that it was the intent "of Congress to place upon the courts and juries "of the country the duty and burden of establish- "ing the rates of transportation for interstate com- "merce and upon the common carrier the burden "of transportation, with the right to ultimately "retain as pay therefor the rate fixed by the ver- "dict of a jury rendered perhaps five years after "the rendition of the services. How is it possible "for a jury to pass understandingly upon the ques- "tions which inhere in the establishment of a "properly proportioned and equalized schedule of "transportation rates? Take this case as an ex- "ample. As already stated the petition contains "23 counts, each count being based upon shipments "made from a different point and at each point "the shipments were made at many different times "within the limits of from one to five years. Now "the theory of the plaintiff is that the jury must "inquire into and determine what the reasonable "rate was for each shipment when made, and by "comparing the reasonable rate thus fixed by "the jury with that actually charged, determine "whether the plaintiff is entitled to damages, and "if so to ascertain the amount on each shipment "made. It is self-apparent that no matter how "intelligent the jury might be. nor how conscien- "tiously and carefully they might endeavor to "deal with the problems thus submitted to them, "it would be wholly impossible for them to reach "a proper verdict under such circumstances. But "suppose the case involved but a single shipment, "would the difficulty be remedied if the theory of "the plaintiff is to prevail? How could the jury "fairly and understandingly deal even with the

"case of a single shipment, provided the duty is "placed upon the jury of determining what a fair "and reasonable charge for the particular service "would be, unless some standard already recog- "nized and established is given them for their guid- "ance? It is impossible for the jury to deal with "the questions of the total cost of building, equip- "ping and operating the line of railway as a whole, "the proportionate cost of the particular transpor- "tation in question, the total amount of business "done over the entire system, the total burden "properly to be laid upon the total business for "transportation charges and the proper propor- "tionate share which the particular shipment "should bear."

It must be obvious that it is utterly impracticable, as well as unjust, to submit a question of this character to a jury, even in a civil action, much less in a criminal prosecution where the most enormous penalties are involved.

It was suggested in argument that after the Commission had fixed a rate and notified the railroad company of such rate that it might still be revoked or modified by an order of the Commission likewise entered of record, and that there was open to the railroad company the remedy of mandamus to compel the Commission to so revoke or modify. Mandamus is treated of in Sections 474–479 of the Kentucky Code of Practice. It is the settled law of Kentucky that wherever a ministerial officer has imposed upon him a duty involving judgment and discretion he cannot be controlled in that duty by mandamus. While he may be compelled to act, the Court cannot say how he shall act. The whole subject is fully gone into in the case of *Booe, County Judge*, v. *Kenner*, 49 Southwestern Reporter, 330, where all Kentucky cases are collected. Among other quotations made in that opinion is the following:

"In Dickens *v.* Cemetery Company, 93 Ky., 389, the Court said: 'It is well settled by this Court (see Cassidy *v.* Young, 92 Ky., 227), that to entitle a party to this writ the officer's duty must be strictly ministerial. But, if he may act in the premises according to his judgment and discretion, then mandamus will not lie to control his judgment and discretion, even though that judgment and discretion are at variance with what is clearly right or dutiful in the premises.'"

The Court continuing, says:

"Innumerable other similar quotations may be made."

If, therefore, the Commission has fixed a rate, and entered the same of record, and notified the railroad company that if the railroad company was to apply for a mandamus, the answer of the Commission would simply be that it had already exercised its discretion in reference to the given rate and that would be the end of the cause.

That the Legislature never contemplated any such procedure under the McChord Act is further evident from the fact that only the short space of ten days intervenes between the mailing of a letter to any officer or employe of the railroad company and the time when it becomes a crime for the railroad company to exceed the rate fixed. That time is hardly sufficient for the company to issue and place in the hands of its agents for their guidance a new tariff, and wholly insufficient for the railroad company in addition to investigate its legal status, have mandamus proceedings framed and instituted, proper process served on the railroad commissioners, the necessary order from the Court, and to secure thereunder the reassembling of the Commissioners and the revocation of the rates in question; and unless

a revocation is actually made and entered within the ten days the rate becomes the law and it becomes a crime on the part of the railroad company to exceed it.

III.

If the McChord Act be held constitutional then it results that the Legislature may establish a scheme whereby rates may be fixed which are conclusive upon the railroad company for all practical purposes and exclude that judicial inquiry to which the railroad company is entitled under the Federal Constitution.

ALEX P. HUMPHREY,
WALKER D. HINES,
For Appellees.

No. 141 L. 145 S.
Cost's Bf. of Mem. [illegible]
for Appellees.
Filed Nov. 15, 1901.
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Supreme Court of the United States.

OCTOBER TERM, 1901.

Nos. 141, 142, 143, 144, and 145.

CHARLES C. McCHORD ET AL., APPELLANTS,

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY, APPELLEE.

AND FOUR SIMILAR CASES.

SECOND ADDITIONAL BRIEF FOR APPELLEES.

ALEX. P. HUMPHREY,
WALKER D. HINES,
For Appellee.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1190

Supreme Court of the United States

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vs.

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AND FOUR SIMILAR CASES.

SECOND ADDITIONAL BRIEF FOR APPELLEES.

I. There has been a gradual development of the doctrine as to the extent to which common carriers and other public-service corporations may have judicial protection against rates fixed by legislatures or under their authority.

In Munn *vs.* Illinois, 94 U. S., 113, and especially in Peik *vs.* Chicago, &c., R. Co., 94 U. S., 164, this court announced that there was no appeal to the courts from rates fixed by the legislature or under its authority. In Spring Valley Co. *vs.* Schottler, 110 U. S., 347, the court suggested that this might be an open question. In the Railroad Commission

cases, 116 U. S., 307, the court distinctly announced that the legislative power was not without limit. In Chicago, &c., R. Co. *vs.* Minnesota, 134 U. S., 418, the court made its first direct application of the principle that a railroad company was entitled to have judicial inquiry as to the reasonableness of rates fixed by a railroad commission. In Budd *vs.* New York, 143 U. S., 517, the court indicated that while a statute delegating to a railroad commission the power to fix rates might be required to provide or permit an opportunity for judicial settlement of the charges, yet the same rule did not apply when the rates were fixed by the legislature. In Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S., 362, this court for the first time actually set aside a body of rates prescribed by a railroad commission of a State, on the ground that they were unreasonably low. In Covington & Lexington Turnpike Road Co. *vs.* Sandford, 164 U. S., 578, this court for the first time held that rates fixed directly by the legislature must be set aside if confiscatory in character. In Smyth *vs.* Ames, 169 U. S., 466, this court, after reviewing all its decisions on the subject, unanimously announced that the question as to whether rates for the transportation of persons or property are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures could not be so conclusively determined by the legislature of the State or by regulations adopted under its authority that the matter might not become subject to judicial inquiry. In C., M., &c., R'y *vs.* Tompkins, 176 U. S., 167, this court announced that the proposition that the owners of railroad property might be deprived of it by the arbitrary enactment of any legislature,

State or national, fixing rates unreasonably low, without any right of appeal to the courts, was one that could not be for a moment tolerated.

In view of the doctrine thus firmly established by this court, it is submitted that legislative enactments, or regulations under legislative authority, attempting to prescribe the measure of compensation which may be enjoyed by common carriers and other public-service corporations, involving, as they necessarily do, the question of what is a reasonable compensation for the use of property thus taken for public service, occupy a distinct class; they are *sui generis;* and the legislature in prescribing methods for their enforcement must necessarily be subject to restrictions to which it is not subject in enactments under the police power which simply prohibit or regulate the use of one man's property in the interest of the public welfare, but which do not go to the extent of actually subjecting that property to the use of others for compensation prescribed by or under those enactments.

II. We contend that when rates are prescribed by or under legislative authority it is unconstitutional to enforce them, in the first instance, by an unrestricted system of prosecutions in which heavy penalities can be imposed upon the carrier. Under such a system the carrier cannot restrain the institution of prosecutions. These penalties will necessarily accumulate in such a way as to compel the carrier to acquiesce in the rates fixed. It cannot take the risk of succeeding in demonstrating in the prosecutions, if such inquiry be allowed there, that the rates are unreasonably low. The case of Fitts *vs.* McGhee, 172 U. S., 516, shows that

under such a system the carrier cannot avoid a great multiplicity of prosecutions and the consequent imposition of penalties aggregating in amount probably the value of its property.

The question as to the constitutionality of such penalties has not been passed upon by this court. It was distinctly reserved in the case of Reagan *vs.* Farmers' Loan & Trust Co., 154 U. S., 362, the court holding that the Texas act was a comprehensive act of regulation which would stand even if the penalties were disregarded.

The cases of Chicago, &c., R. Co. *vs.* Wellman, 143 U. S., 339; Budd *vs.* New York, 143 U. S., 517, and St. Louis, &c., R. Co. *vs.* Gill, 156 U. S., 649, are not, as contended by appellants' counsel, authorities upholding the constitutionality of penalties of this description. The point was not presented or considered in any of those cases. When the Wellman and Budd cases were decided the court distinctly reserved the question as to whether it could declare unreasonable any rate fixed directly by the legislature, and, of course, could not be presumed to be passing upon the further question as to whether, if it had the power to set such rates aside, it would be constitutional to enforce such rates by an unrestricted scheme of penalties. In the Gill case, likewise, the court withheld any distinct declaration that it had the power to declare rates fixed by the legislature unreasonable. In both the Wellman and Gill cases, and also in the case of Dow *vs.* Beidelman, 125 U. S., 680, the court emphasized the difficulty of considering such a question in a penal action instituted by a private citizen, and, of course, the same difficulty would exist in a prosecution instituted by a grand jury or a purely local prosecuting

officer. Moreover, if there were any expressions in the Gill case which might look in the direction of upholding as constitutional an unrestricted scheme of penalties, they must be regarded as modified by the subsequent holding of this court in the case of Smyth *vs.* Ames, 169 U. S., 466.

The case of Fitts *vs.* McGhee, 172 U. S., 516, does not, as appellants' counsel contend, hold that such penalties are constitutional, because in that case the court did not attempt to pass upon the merits of the statute, but simply held that it had no jurisdiction because it was a suit against the State.

In Chicago, &c., R. Co. *vs.* Minnesota, 134 U. S., 418, and in St. Louis, &c., R. Co. *vs.* Gill, 156 U. S., 649, this court seemed to recognize the propriety, if not the necessity, for some general and conclusive method of determining the reasonableness of rates, wherein the State might be adequately represented. In the case of Smyth *vs.* Ames, 169 U. S., 466, the court, in upholding the jurisdiction of a court of equity in such a case, emphatically demonstrated the absolute necessity, from the standpoint of the railroad company, for some proceeding of that nature, if it were to have any judicial protection whatever. In that case the court said:

"Under the principles which in the Federal system distin-
"guish cases in law from those in equity, the circuit court of
"the United States, sitting in equity, can make a comprehen-
"sive decree covering the whole ground of controversy, and
"thus avoid the multiplicity of suits that would inevitably
"arise under the statute. The carrier is made liable not
"only to individual persons for every act, matter or thing
"prohibited by the statute, and for every omission to do any
"act, matter or thing prescribed by the statute, but to a fine

"of from one thousand to five thousand dollars for the first "offense, from five thousand to ten thousand dollars for the "second offense, from ten thousand to twenty thousand dollars "for the third offense, and twenty-five thousand dollars for "every subsequent offense. The transactions along the line of "any one of these railroads, out of which causes of action might "arise under the statute, are so numerous and varied that "the interference of equity could well be justified upon the "ground that a general decree, according to the prayer of "the bills, would avoid a multiplicity of suits, and give a "remedy more certain and efficacious than could be given "in any proceeding instituted against the company in a court "of law; for a court of law could only deal with each sepa-"rate transaction involving the rates to be charged for trans-"portation. The transactions of a single week would expose "any company questioning the validity of the statute to a "vast number of suits by shippers, to say nothing of the "heavy penalties named in the statute. Only a court of "equity is competent to meet such an emergency and de-"termine once for all and without multiplicity of suits, mat-"ters that affect not only individuals but the interests of the "entire community as involved in the use of a public high-"way and in the administration of the affairs of the quasi-"public corporation by which such highway is maintained."

If the Nebraska statute had been framed as was the Alabama statute involved in Fitts *vs.* McGhee, so that suit for injunction could not have been maintained, it is obvious that the Nebraska companies would have had no substantial opportunity to seek judicial protection, but would have been compelled on account of the heavy fines imposed to observe the rates fixed by the Nebraska legislature. They would, for practical purposes, have been denied the judicial protection to which the court said they were entitled.

Under the operation of the scheme of unrestricted penalties prescribed by the McChord act, the railroad company would either have to acquiesce entirely in the rates fixed by the commission or disregard them in all instances. If it did the former, it would necessarily be deprived of the judicial protection to which it is entitled. If it did the latter, it would encounter the menace of penalties as above explained. The railroad company could not, in order to make a test case, follow a middle course of charging its own rates in some instances and the commission's rates in other instances until a final decision could be reached, because (1) this could only be done on agreement with the prosecuting officers of the State; (2) it would still involve the company's being forced to carry the bulk of its traffic at the unreasonably low rate, and (3) under section 215 of the constitution, the company is bound to charge the same rate to all for the same service, under penalties varying from $2,000, for the first offense, to forfeiture of its charter for the third offense, according to section 217 of the constitution. Sections 215 and 217 of the constitution read as follows:

"215. All railway, transfer, belt lines or railway bridge "companies shall receive, load, unload, transport, haul, de- "liver and handle freight of the same class for all persons, "associations or corporations, from and to the same points "and upon the same conditions, in the same manner and for "the same charges, and for the same method of payment."

"217. Any person, association or corporation, willfully or "knowingly violating any of the provisions of sections 213, "214, 215 or 216, shall, upon conviction by a court of com- "petent jurisdiction, for the first offense be fined two thou- "sand dollars; for the second offense, five thousand dollars;

"and for the third offense, shall thereupon, '*ipso facto*,' for-
"feit its franchise, privileges or charter rights; and if such
"delinquent be a foreign corporation, it shall '*ipso facto*'
"forfeit its right to do business in this State; and the at-
"torney general of the Commonwealth shall forthwith, upon
"notice of the violation of any of said provisions, institute
"proceedings to enforce the provisions of the aforesaid
"sections."

III. In Bronson *vs.* Kinsey, 1st Howard, 311, this court considered whether a State law passed subsequently to the execution of a mortgage, relating to the remedy for enforcing the mortgage, amounted to an impairment of the obligation of the mortgage. The court said:

"It is difficult, perhaps, to draw a line that would be ap-
"plicable in all cases between legitimate alterations of the
"remedy and provisions which, in the form of remedy,
"impair the right. But it is manifest that the obligation of
"the contract and the rights of a party under it may, in
"effect, be destroyed by denying a remedy altogether; or
"may be seriously impaired by burdening the proceedings
"with new conditions and restrictions, so as to make the
"remedy hardly worth pursuing. And no one, we pre-
"sume, would say that there is any substantial difference
"between a retrospective law declaring a particular contract
"or class of contracts to be abrogated and void and one
"which took away all remedy to enforce them or encum-
"bered it with conditions that rendered it useless or imprac-
"ticable to pursue it."

In speaking further of the function of the remedy, the court said:

"It is the part of the municipal law which protects the
"right, and the obligation by which it enforces and main-

"tains it. It is this protection which the clause of the Con-
"stitution now in question mainly intended to secure.
"And it would be unjust to the memory of the distinguished
"men who framed it, to suppose that it was designed to pro-
"tect a mere barren and abstract right, without any practi-
"cal operation upon the business of life."

We conceive the question now before the court is the question whether the right of public-service corporations to protection against unreasonably low rates fixed by the legislature or under its authority may, at the pleasure of the legislature, be seriously impaired by burdening the remedy with conditions and restrictions so as to make the remedy not worth pursuing, and so as to reduce the supposed right to a "mere barren and abstract right, without any practical operation upon the business of life."

We do not believe that the court can uphold the McChord act without holding that the legislature is absolutely free from any restriction in the choice of methods to enforce the rates prescribed by it or under its authority. To say that the legislature is so unrestricted is to say that the rights secured by the Constitution of the United States may be constitutionally destroyed by a practical destruction of every practicable remedy.

IV. Appellants' counsel now contend in oral argument that under the McChord act, and other statutes of Kentucky, the railroad commission has the exclusive power of inaugurating these prosecutions, and that therefore these prosecutions can be controlled by enjoining the commission from inaugurating them. Appellants' counsel insisted in their original brief that the railroad commission had no duty or

authority whatever with respect to instituting these prosecutions, and in fact that the commission had no connection whatever with the enforcement of the rates they might fix. In their last supplemental brief they contend that the commission "probably" has the right to recommend indictments, but do not contend that this power is exclusive. In oral argument they went beyond this, and now claim that the commission has the exclusive power, by virtue of section 819, Kentucky statutes, and say this power is further confirmed by the case of the Illinois Central R. Co. *vs.* Commonwealth, decided by the court of appeals on October 25, 1901, and printed as an appendix to this brief.

It is, of course, immaterial whether the commission has the right to recommend indictments or not, unless that right is exclusive, for even though the commission may have the right to recommend such indictments, still if indictments can be found at the will of grand juries, without such recommendation from the commission, an injunction against the commission would be without effect in restraining prosecutions. There seems to be no warrant for the contention that section 819 of the Kentucky statutes is part of the McChord act, so as to prevent indictments except upon recommendation of the commission. The title of the McChord act shows that that act was designed to prescribe the manner of enforcing its provisions. That the legislature did not contemplate that section 819 of the Kentucky statutes would be regarded as part of the McChord act is clear, because the McChord act proceeded to declare the courts which would have jurisdiction of the offenses and the limitation for the prosecutions, although both of these points had been regulated by section 819 of the Kentucky statutes. We sub-

mit that this court cannot read into the McChord act, which is obviously a complete system of regulation in itself, the provision that indictments under that act can be found only upon recommendation of the railroad commission, when the legislature not only did not insert that provision in the act but expressly refused to do so. Nor can it assume that the court of appeals of Kentucky will insert such a qualification into the McChord act. The case of the Illinois Central R. Co. *vs.* Commonwealth, above referred to, instead of indicating that the court of appeals of Kentucky would read this provision into the McChord act, indicates the contrary. It will be observed that the court held in that case that under section 820 of the Kentucky statutes (long and short haul section) indictments could be found only after the railroad commission had refused to exonerate, because that section expressly provided for complaint to the commission, and that the commission should file its order refusing to exonerate in order that the company might be indicted. The opinion plainly shows that if such a provision had not been in that section the court would not have held that there was an exclusive power of initiating prosecutions in the railroad commission, simply because of section 819 and section 821 of the Kentucky statutes.

In support of their contention that section 819 of the Kentucky statutes gives the railroad commission the sole and exclusive right to inaugurate prosecutions under the McChord act appellants' counsel relied with especial emphasis upon Southern Pacific Company *vs.* Board of Railroad Commissioners, 78 Fed. Rep., 236. In that case the very section of the constitution which empowered the commission to fix rates made it the duty of the commission to

enforce their decisions and correct abuses through the medium of the courts. The court simply held that the proper interpretation of the words "enforce their decisions and correct abuses through the medium of the courts" embraced their orders with regard to rates, pointing out that, according to the ordinary rules of construction, any narrower interpretation of the words in question would be obviously improper. The court did not undertake to import the railroad commission into the section in the matter of enforcing their rates. The duty of enforcement resting upon the commission was already expressly in the section, and the court simply construed that already existing duty in the proper way. In the case at bar the appellants' counsel ask this court to import into the McChord act the exclusive duty of enforcement upon the commission, when the act itself imposes no duty whatever upon the commission with respect to the enforcement of its rates, but, on the contrary, clearly indicates that it was intended as a complete method of enforcement, without reference to any other statute.

We submit, therefore, that the case of Southern Pacific Company *vs.* Board of Railroad Commissioners, 78 Fed. Rep., 236, is no authority for appellants' contention, but is necessarily distinguishable from the case at bar, as was pointed out by appellants' counsel in their original brief, in the following language:

"In that case, however, the statute expressly delegated to "the railroad commissioners the power and duty not only "of making and changing the rate and revising it, from "time to time, but also the right, power and duty of enforc- "ing their own orders and decisions, both directly, as far as

"power was conferred, and, in addition thereto, through the "medium of the courts" (pp. 35, 36).

V. We conceive that the contention of appellants' counsel that upon trial of an indictment for failing to charge a rate fixed by the railroad commission, the question as to the reasonableness of that rate would be a question of law for the court and not a question of fact for the jury, is a contention immaterial in this case. Even if it be a question of law for the court, it still remains that the railroad company would be deterred from seeking this method of judicial investigation because of the tremendous forfeit which would be at stake; and it would be subject to the entirely distinct objection that if the penalty were imposed upon such a trial, it would be imposed because the carrier had committed an act and thereafter the court had disagreed with the carrier upon the reasonableness of the elements surrounding that act (L. & N. R. Co. *vs.* Commonwealth, 99 Ky., 132). It may be added, however, that this court in the Wellman case, 143 U.S., 339, plainly indicated that this was a question of fact for a jury and not of law for the court.

VI. In Wisconsin, &c., R. Co. *vs.* Jacobson, 179 U.S., 287, the court said:

"A statute, or regulation provided for therein, is frequently "valid, or the reverse, according as the fact may be, whether "it is a reasonable or unreasonable exercise of legislative "power over the subject-matter involved. And in many "cases questions of degree are the controlling ones by which "to determine the validity, or the reverse, of legislative "action."

Unless the court holds that the legislature is entirely without restriction in prescribing the methods of enforcing rates which it declares to be the compensation which public-service corporations shall receive for the use of their property in the public service, we respectfully submit that, aside from the specific objections already urged against the McChord act, it is on its face such an essentially unreasonable method of enforcing rates as that it ought on that account to be condemned.

VII. Upon the question of jurisdiction we submit:

1. These suits were based upon the theory that the McChord act is, as a whole, unconstitutional.

2. Since by the McChord act the railroad commissioners are charged with the special duty of carrying out its provisions to the extent of making rates, such suits against these commissioners are not suits against the State.

3. If the McChord act is unconstitutional and the commissioners therefore have no right to take any steps under that act, it cannot be interference, either with legislative discretion or with the lawful discretion of the commission, to restrain the commission from proceeding to carry out this unconstitutional act. In every case cited by appellants' counsel where the court has refused to enjoin action by the commission, the court so held because it held that the law under which the commission was acting was not unconstitutional and void.

4. If the act is unconstitutional and the commission consequently has no power to interfere with the rates of the railroad companies, it is necessarily a wrong for the commission to interfere at all with the rates of the railroad companies under that act. The commission admits that it proposes to interfere with those rates under that act. This threatened wrong would be irreparable and the railroad companies would have no adequate remedy at law. To say that they would have adequate remedy at law is simply to deny that the act is unconstitutional for the reasons assigned by us. The multiplicity of prosecutions which would inevitably result is, moreover, of itself sufficient ground for interference of equity.

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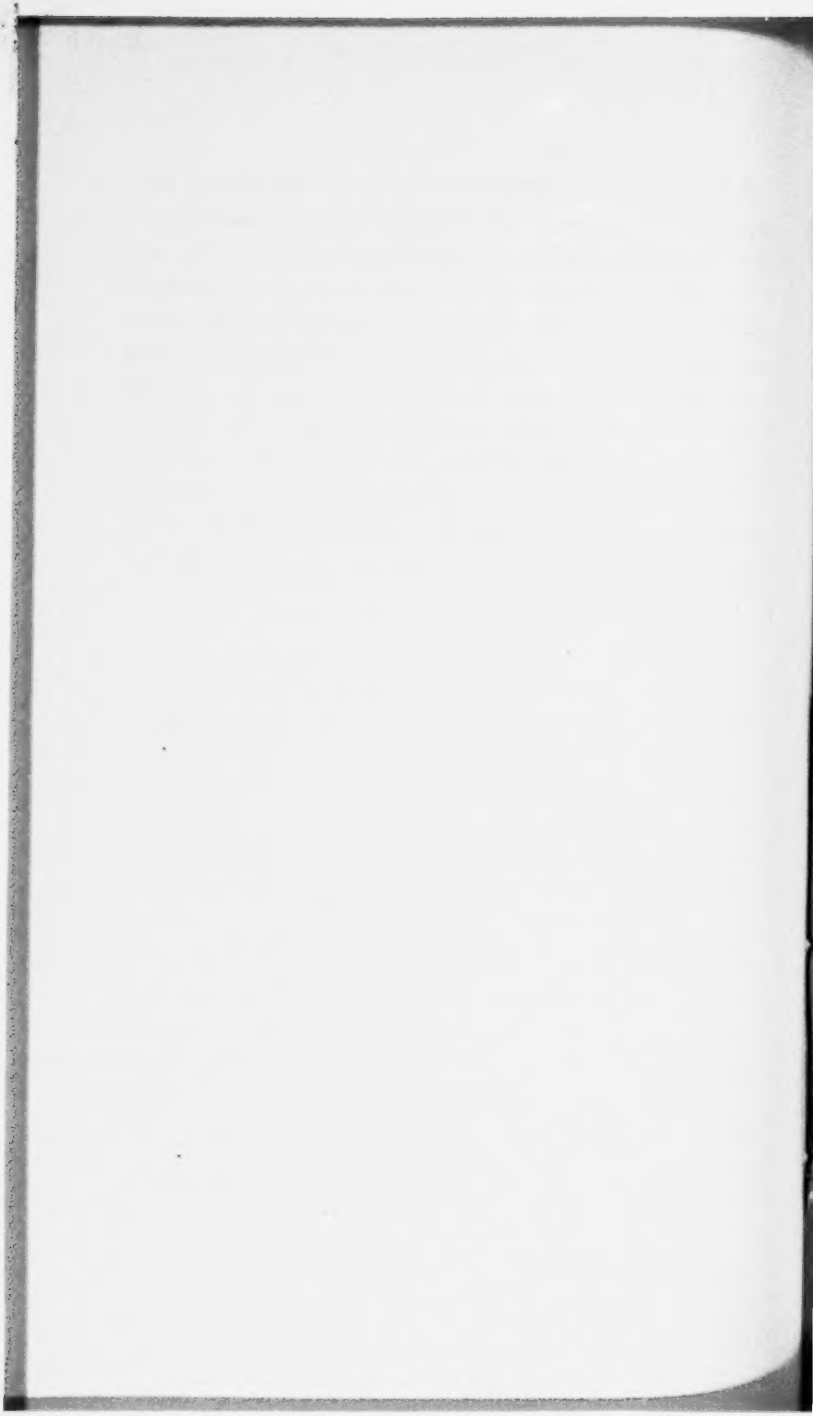
For Appellees.



APPENDIX.

KENTUCKY COURT OF APPEALS, OCTOBER 25, 1901.

ILLINOIS CENTRAL RAILROAD COMPANY, *Appellant*,
vs.
COMMONWEALTH OF KENTUCKY, *Appellee*.

Appeal from the Hardin circuit court.

Opinion of the Court by Judge Hobson.

Appellant was indicted in the Hardin circuit court, and fined $200.00 for charging more for hauling a car-load of coal from Deanfield, Kentucky, to Stevensburg, Kentucky, than from Deanfield through Stevensburg to Louisville. The indictment was returned June 10, 1899. At that time the railroad commission had not determined whether appellant should be exonerated as provided by the statute. The first question to be determined on the appeal is whether under the statute the carrier may be indicted by the grand jury before the railroad commission has refused to exonerate it. The statute is in these words (Kentucky Statutes, sec. 820):

"If any person owning or operating a railroad in this State or any common carrier, shall charge or receive any greater compensation in the aggregate for the transportation of passengers or property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance, over the same line in the same direction, the shorter being included within the longer distance, such person shall, for each offense, be guilty of a misdemeanor, and fined not less than one hundred nor more than five hundred dollars, to be recovered by indictment in the Franklin circuit court, or the circuit court

of any county into or through which the railroad or common carrier so violating runs or carries on its business. Upon complaint made to the railroad commission that any railroad or common carrier has violated the provisions of this section, it shall be the duty of the commission to investigate the grounds of complaint, and if, after such investigation, the commission deems it proper to exonerate the railroad or common carrier from the operation of the provisions of this section, an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission, and after such order the railroad or carrier shall not be prosecuted or fined on account of the complaint made. If the commission, after investigation, fails to exonerate the railroad or carrier from the operation of the provisions of this section an order in writing to that effect shall be made by the commission, and a copy thereof delivered to the complainant and the railroad or common carrier, and the same shall be published as a part of the report of the commission; and after such order it shall be the duty of the commission to furnish a statement of the facts, together with a copy of its order, to the grand jury of any county, the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense; and the commission shall use proper efforts to see that such company or carrier is indicted and prosecuted."

In the construction of statutes the cardinal aim of the court is to arrive at the intention of the legislature. The court will presume that the legislature meant something by all the provisions of the statute, and will endeavor to give them all a fair effect. If the legislature had intended indictments to be found for each offense, regardless of action by the railroad commission, we see no reason why the section might not have stopped with the first sentence defining the offense and providing for its punishment, for by the next section (Kentucky Statutes, sec. 821) it is made the duty of the commission:

"To see that the laws relating to all railroads, except street, are faithfully executed;" and under this provision it would be the duty of the commission to see to violations of the preceding section. Not only so, but it is provided in section 820 that if the commission deems it proper to exonerate a carrier from the operation of its provisions an order to that effect shall be made, and after such order the carrier shall not be prosecuted for that matter. To indict the carrier in the first place without action by the railroad commission would be to deprive it of all benefit of this provision. If the commission had only power to pass on the same facts as the grand jury, it might, perhaps, be maintained that the legislature intended to provide a cumulative remedy and that a preliminary hearing before the commission was not essential. But such is not the fact. The statute is made pursuant to the following provision of the constitution (section 218):

"It shall be unlawful for any person or corporation, owning or operating a railroad in this State, or any common carrier, to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of property of like kind, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance; but this shall not be construed as authorizing any common carrier, or person or corporation, owning or operating a railroad in this State, to receive as great compensation for a shorter as for a longer distance: *Provided*, That upon application to the railroad commission, such common carrier or person, or corporation owning or operating a railroad in this State, may in special cases, after investigation by the commission, be authorized to charge less for longer than for shorter distances for the transportation of passengers or property; and the commission may, from time to time, prescribe the extent to which such common carrier, or person or corporation, owning or operating a railroad in this State, may be relieved from the operation of this section."

In construing this provision in L. & N. R. R. Co. *vs.* Commonwealth, 20 R., 1380, it was held that the circumstances or conditions exempting the railroad altogether from the operation of the section did not include competition with other lines; and in the subsequent case of L. & N. Railroad Co. *vs.* Commonwealth, 21 R., 232, this ruling was adhered to; and it was further held that in such cases the power was vested in the railroad commission to exonerate the carrier. We said:

"It is urged that this construction of the constitution will allow coal and other freight from without the State to be shipped cheaper than they can be hauled to the same point if shipped within the State, as under the interstate commerce act competition is held to exclude the carrier from the long and short haul clause. The constitutional convention, no doubt, had just such considerations in mind when it gave the railroad commission the plenary powers conferred on it as above explained. It is the duty and, no doubt, will be the pleasure of the railroad commission to so regulate the matter that no injustice shall be done any industry in the State, and the true interests of the Commonwealth as a whole be promoted."

It will be observed that the constitutional convention did not adopt a hard and fast rule making the charge of more for the short than for the long haul unlawful, but expressly empowered the commission to authorize the railroad to charge less for longer than for shorter distances, and to prescribe from time to time the extent to which the carriers might be relieved from the operation of the section. There were many industries in the State whose interests required this. More than one coal famine had occurred. The only security against a recurrence of this trouble was our domestic coal; but this could not be available unless given lower rates, so that it could compete in the market with coal shipped by water. If it could not thus compete, it could not be relied on as a supply in an emergency. The low rate in this case was given on coal shipped to Louisville,

because it there came in competition with the coal brought down the Ohio river. The railroad commission was the only tribunal authorized to relieve appellant from the operation of the section. No such power was vested in the courts. The question of competition could not be examined there, nor could it be shown that a proper case existed for exoneration from the section. The legislature, therefore, provided for the preliminary hearing before the railroad commission, not as a cumulative remedy, but that it might determine whether the carrier should be exonerated or not, and, therefore, it was provided that if the commission relieved the carrier from the operation of the section no prosecution should be had on account of the matter complained of. It also further provided that if the commission failed to exonerate the carrier it should make an order in writing to that effect and furnish "a statement of the facts, together with a copy of its order to the grand jury of any county the circuit court of which has jurisdiction, in order that the railroad company or carrier may be indicted for the offense." The requirement that the commission should furnish the grand jury a copy of its order *in order that* the railroad company might be indicted for the offense must be read in connection with the previous clause, that if the company was exonerated the railroad company should not be prosecuted. The plain meaning of the two together is that the railroad company may be indicted for the offense if not exonerated, and may not be indicted if it is exonerated, and the copy of the order of the commission refusing to exonerate it is required to be furnished to the grand jury *in order* that the company may be indicted.

From the section as a whole it is clear that the legislature had in mind providing for the exoneration of the railroad from its provisions in proper cases and exempting the carrier from criminal liability to this extent. It therefore provided for an investigation by the railroad commission, a determination by it whether it deemed it proper to exonerate the

railroad and for the enforcement of its decision by indictment by the grand jury in case the railroad was not exonerated. To allow the carrier to be indicted in advance of any action by the railroad commission under this section would be to deprive it of all opportunity for exoneration. The legislature had no such result in mind, but clearly aimed to secure to the carrier a hearing on this question.

The long and short haul matter is only another form of undue discrimination and preference, which are provided for by section 819, and indictments under this section can only be had upon the recommendation of the railroad commission. This has been a settled legislative policy, as shown by the act of April 6, 1882 (see General Statutes, 1021), which was in force at the time of the adoption of the constitution and the present statutes. In other words, the legislature has always acted upon the idea that the interests of the entire people of the State should be looked to in these matters, and that the railroad commission must first determine them before the grand juries of the State should find indictments.

The precise question raised in this case was before this court in the case of Louisville & Nashville Railroad Co. *vs.* Commonwealth, 21 R., 239. In that case the company had been fined under an indictment found at the request of the railroad commission, and one of the grounds of new trial was that the court had erroneously admitted the order of the railroad commission refusing to exonerate the company to be read to the jury on the trial, and it was insisted that this had prejudiced the defendant on the trial and caused a large fine to be assessed against it. The reading of the order of the commission was clearly prejudicial to the defendant, if improper. This court, however, affirmed the judgment and said:

"There was no error in allowing the order of the railroad commission to be read. This has in effect been determined by this court in the preceding cases."

The matter was not further elaborated at that time because it was considered concluded by the reasoning of the preceding case and the judgment on the former appeal (L. & N. Railroad Co. *vs.* Commonwealth, 20 R., 1380). It was proper to read the order of the railroad commission to the jury only because the statute required a copy of the order to be filed with the grand jury *in order that* the defendant might be indicted. It was the basis of the proceeding without which the prosecution could not be had. Upon a reexamination of the question we adhere to the conclusion then reached.

It is also insisted for the appellee that the statute thus construed is unconstitutional; but section 218 of the Constitution prescribes no penalty. What penalty should be imposed or when was absolutely within the discretion of the legislature. Without section 820, there is no provision of law for imposing a penalty, and if a penalty cannot be imposed under that section on the facts of this case, then there is no provision of law under which the prosecution can be maintained. We do not question the power of the legislature to provide for prosecutions without action by the railroad commission; we only determine that it has not done so by the provision quoted.

Thus construed, the statute does not seem to us in violation of any right secured by the Federal Constitution. The convention in framing the State constitution, if it had seen proper, might have made it unlawful to charge more for the short than for the longer haul under any circumstances. When it did not adopt an absolute rule to this effect, but allowed the carrier to be relieved from the operation of the section, this was more favorable to the carrier than an absolute prohibition would have been. The convention might have vested the power of exoneration in the legislature and authorized it by general laws to regulate the subject. When it created a special tribunal to determine when and under what circumstances the highways of the State might be

so used as to give some shippers preference over others it violated no right of the railroads, for the State in the exercise of its police power had the right to protect the people of the State from extortion and discrimination on the public highways constructed under the power of eminent domain and exercising franchises bestowed by the State. The right of due process of law secured by the Constitution does not extend to matters which at common law were not of judicial cognizance so as to require them to be tried now by the courts (Wulzen *vs.* San Francisco, 101 Cal., 15; 40 Amer. St. Rep., 17; Eames *vs.* Savage, 77 Me., 212; 52 Amer. Rep., 757; Weimer *vs.* Bunberry (Cooley, judge), 30 Mich., 201). The question, what tolls may be charged on a highway, or when or under what circumstances it would be right to charge more for the short than for the longer haul was not at common law of judicial cognizance, and the State has the right in the exercise of its police power to commit the decision of these questions to other branches of the Government than the judiciary. It may create special agencies for the determination of such matters and make their judgments final. Ultimate power must be vested somewhere. It cannot be assumed that the judiciary will be less liable to err than other departments of the Government.

Judgment reversed with directions to dismiss the indictment.

Whole court sitting. Chief Justice Paynter, Judges Guffy and White dissenting.

Office Supreme Court U.S.
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Clerk

No. 398 143

Br. of Wadsworth & Cochran

for Appellees.

Supreme Court of the United States

OCTOBER TERM, 1900.

Filed Jan. 7, 1901.

CHARLES C. McCHORD et al,
Appellants,

versus

CHESAPEAKE & OHIO RAILWAY COMPANY
and four other cases heard therewith,
Appellees.

Appeal from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR APPELLEES.

W. H. WADSWORTH,
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Attorneys for Appellees.

The Court Index Press, Cincinnati, Ohio.

1875

Supreme Court of the United States

OCTOBER TERM, 1900.

CHARLES C. McCHORD, JAMES F. DEMPSEY and JOHN C. WOOD,

Appellants,

No. 398. *vs.*

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

and four other cases heard therewith.

Appellees.

Appeal from the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

By Section 816 of Kentucky Statutes, it is provided:

"If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this state, or for the use of any railroad car upon its track, or upon any track it has control of or the right to use in this state, it shall be guilty of extortion."

And by Section 819 thereof, it is provided:

"Any railroad corporation that shall be guilty of extortion . . . shall, upon conviction, be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars; and, upon a second conviction, in any sum not less than five hundred dollars, nor more than two thousand dollars; and, upon a third conviction, in any sum not less than two thousand dollars, nor more than five thousand dollars. The Circuit Court of any county into or through which the line of railroad may run, owned or operated by the corporation alleged to be guilty, as aforesaid, . . . shall have jurisdiction of the offense which shall be prosecuted by indictment . . . upon information filed by the Board of Railroad Commissioners."

These statutory provisions were part of an act of the Legislature of Kentucky entitled, "An Act to prevent extortion and discrimination in the transportation of freight and passengers by railroad corporations, and in aid of that purpose to establish a Board of Railroad Commissioners and define its power and duties," which became a law April 6th, 1882, and may be found in Session Acts, 1881, of Kentucky, Vol. 1, p. 66.

They were adjudged to be unconstitutional by the Court of Appeals of Kentucky in an opinion rendered April 4th, 1896, upon an appeal from the judgment of the Marion Circuit Court, assessing a fine upon an indictment found in pursuance to them. It is reported in the case of

Louisville & Nashville R. R. Co. v. *Commonwealth*, 99 Ky., p. 133.

The ground upon which the act was held to be unconstitutional is thus stated by Hazelrigg, J.:

"There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so, as that standard

must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

"If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws."

Subsequent to this decision, thus overthrowing these statutory provisions and evidently as a substitute therefor, the Legislature of Kentucky, at its ever memorable session in the winter of 1900, enacted a law popularly known as the McChord act, which was approved March 10th, 1900, and may be found in Session Acts, 1900, p. 5. It is as follows:

"AN ACT

"To prevent railroad companies or corporations owning and operating a line or lines of railroad, and its officers, agents and employes from charging, collecting or receiving extortionate freight or passenger rates in this commonwealth, and to further increase and define the duties and powers of the Railroad Commission, in reference thereto, and prescribing the manner of enforcing the provisions of this act and penalties for the violation of its provisions.

"*Be it enacted by the General Assembly of the Commonwealth of Kentucky:*

"1. When complaint shall be made to the Railroad Commission accusing any railroad company or corporation of charging, collecting or receiving extortionate freight or passenger rates, over its line or lines of railroad in this commonwealth, or when said commission shall receive information, or have reason to believe that such rate or rates are being charged, collected or received, it shall be the duty of said commission to hear and determine the matter as speedily as possible. They shall give the company or corporation complained of not less than ten days' notice, by letter mailed to an officer or employe of said company or corporation, stating the time and place of the hearing of same; also the nature of the complaint or matter to be in-

vestigated, and shall hear such statements, argument or evidence offered by the parties as the commission may deem relevant, and should the commission determine that the company or corporation is, or has been, guilty of extortion, said commission shall make and fix a just and reasonable rate, toll or compensation, which said railroad company or corporation may charge, collect or receive for like services thereafter rendered. The rate, toll or compensation so fixed by the commission shall be entered and be an order on the record book of their office and signed by the commission, and a copy thereof mailed to an officer, agent or employe of the railroad company or corporation affected thereby, and shall be in full force and effect at the expiration of ten days thereafter, and may be revoked or modified by an order likewise entered of record. And should said railroad company or corporation or any officer, agent, or employe thereof, charge, collect or receive a greater or higher rate, toll or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided, said company or corporation, and said officer, agent or employe shall each be deemed guilty of extortion, and upon conviction shall be fined for the first offense in any sum not less than five hundred dollars, nor more than one thousand dollars, and upon a second conviction, in any sum not less than one thousand dollars nor more than two thousand dollars, and for a third and succeeding convictions, in any sum not less than two thousand dollars nor more than five thousand dollars.

"2. The Circuit Court of any county into or through which the line or lines of road carrying such passenger or freight, owned or operated by said railroad, and the Franklin Circuit Court shall have jurisdiction of the offense against the railroad company or corporation offending, and the Circuit Court of the county where such offense may be committed by said officer, agent or employe, shall have jurisdiction in all prosecutions against said officer, agent or employe.

"3. Prosecutions under this act shall be by indictment.

"4. All prosecutions under this act shall be commenced within two years after the offense shall have been committed.

"5. In making said investigation said commission may, when deemed necessary, take the depositions of witnesses before an examiner or notary public, whose fee shall

be paid by the state, and upon the certificate of the chairman of the commission, approved by the Governor, the Auditor shall draw his warrant upon the Treasurer for its payment."

This act, under Section 55 of the Constitution of Kentucky, became a law on 12th day of June, 1900, which was ninety days after the adjournment of that session of the Legislature.

Pending the consideration of said act in the House an amendment was offered to Section 3 thereof, adding after the words "prosecution under this act shall be by indictment" the words "upon information filed before the grand jury by the Railroad Commission, or any member thereof, and the defendant shall be permitted, upon trial, to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll or compensation," and it was rejected (see House Journal, 1900, p. 533).

This suit was instituted in the Circuit Court for the District of Kentucky on the 5th day of July, 1900, by the Chesapeake & Ohio Railway Company, as complainant, vs Charles C. McChord, James F. Dempsey and John C. Wood, who then constituted the Board of Railroad Commissioners for the state of Kentucky, as defendants, and the relief sought was an injunction against said defendants enjoining and restraining them from taking any action under the provisions of said act on the ground that it was unconstitutional and void. To the bill of complaint said defendants filed a demurrer, which was overruled, and, defendants declining to answer, a decree was rendered granting the relief sought, from which this appeal is taken.

The sole question which it presents for consideration and determination is as to whether said McChord act is one of the laws of the state of Kentucky. Our contention is that it is not.

BRIEF OF THE ARGUMENT.

Our argument is made up of three distinct propositions, which we will state in logical order and each of which we will endeavor to maintain.

I.

A legislative act which prescribes a penalty against a common carrier for charging and collecting a rate for the transportation of a passenger or of freight in excess of a maximum rate fixed by it, or fixed by an administrative board under its authority, and which does not permit the common carrier in a proceeding to enforce the penalty to question the justice and reasonableness of the rate fixed, is unconstitutional.

This proposition is itself a conclusion drawn from several subordinate propositions.

1st. A Legislature has no unlimited power to fix such rates, nor has it power to confer unlimited power on an administrative board to fix them.

It is well settled that a Legislature has power to fix such rates and that it has power to confer power on an administrative board to fix them. When fixed by the Legislature, it is said to be done in the exercise of a legislative function. When fixed by an administrative board under authority from the legislators, it is said to be done in the exercise of an administrative function.

As said by Mr. Justice Brewer in

Reagan v. *Farmer's Loan & Trust Co.*, 154 U. S., 362:

"There can be no doubt of the general power of a state to regulate the fares and freights which may be charged and received by railroad and other carriers and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the state for carrying into effect the will of the state as expressed by its Legislature."

The power to fix rates by the Legislature itself in the exercise of a legislative function has been recognized and upheld by this court in the following cases:

Munn v. *Illinois*, 94 U. S., 113.
C. B. & Q. R. R. Co. v. *Cutts*, 94 U. S., 155.
Peck v. *Chicago & Mo. Ry. Co.*, 94 U. S., 164.
Winona, etc., Ry. Co. v. *Blake*, 94 U. S., 179.
Ruggles v. *People of Illinois*, 108 U. S., 536.
Dow v. *Beidelman*, 125 U. S., 680.
Chicago & G. T. R. Co. v. *Wellman*, 143 U. S., 339.
Budd v. *State of New York*, 143 U. S., 517.
St. Louis & S. F. R. Co. v. *Gill*, 156 U. S., 649.
Covington & L. Turnpike Road Co. v. *Sandford*, 164 U. S., 572.
Smyth v. *Ames*, 169 U. S., 466.

The power to fix rates by a commission or other administrative board in the exercise of an administrative function when so authorized by the Legislature has been recognized and upheld by this court in the following cases:

Spring Valley Water Works v. *Schottler*, 110 U. S., 347.
Stone v. *Farmer's Loan & Trust Co.*, 116 U. S., 307.
Georgia R. R. & Banking Co. v. *Smith*, 130 U. S., 174.
Chicago, M. & St. P. R. R. Co. v. *State of Minnesota*, 134 U. S., 418.
Reagan v. *Farmer's Loan & Trust Co.*, 154 U. S., 362.
San Diego v. *National City*, 174 U. S., 740.
Chicago, M. & St. P. R. Co. v. *Tompkins*, 176 U. S., 167.

But the Legislature has not unlimited power in this matter nor can it confer unlimited power upon a commission. Expressions may be found to the contrary in the decisions of this court. In *Munn* v. *Illinois*, Mr. Chief Justice Waite said:

"We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts."

And again in *Peik* v. *Chicago & N. W. R. Co.*, he said:

"Where property has been clothed with a pubiic interest, the Legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts as well as the people. If it has been improperly fixed, the Legislasure, not the courts, must be appealed to for the change."

And Mr. Justice Bradley, in his dissenting opinion, concurred in by Mr. Justice Gray and Mr. Justice Lamar, in the case of *Chicago, M. & St. P. R. R. Co.* v. *State of Minnesota*, said:

"I repeat, when the Legislature declares that the charges shall be reasonable, or. which is the same thing, allows the common law rule to that effect to prevail, and leaves the matter there, then resort may be had to the courts to inquire judicially whether the charges are reasonable. Then, and not until then, is it a judicial question. But the Legislature has the right, and it is its prerogative, if it chooses to exercise it, to declare what is reasonable.

"This is just where I differ from the majority of the court. They say, in effect, if not in terms, that the final tribunal or arbitrament is the judiciary; I say it is the Legislature. I hold that it is a legislative question, not a judicial one, unless the Legislature or the law (which is the same thing) has made it judicial, by prescribing the rule that the charges shall be reasonable, and leaving it there."

The question was not involved in the Munn and "Granger" cases and hence these expressions were mere *obiter dicta*. As said by Mr. Justice Brewer in *Reagan* v. *Farmer's Loan & Trust Co.*:

"There was in those cases no decision as to the extent of control, but only as to the right of control."

And the expression quoted from the Minnesota case was, as stated, contained in a dissenting opinion. But whatever tendency there may have been in this court or any member of it, at the beginning and in the earlier period of the development of the law on this subject, to go to this extreme length in upholding legislative action, that tend-

ency no longer exists. No one questions now that the power of the Legislature in this particular is a restricted and a limited one. But we regard the truth of this proposition to be so essential to the validity of our argument in this case—being, indeed, the foundation upon which the entire structure is built—that we think it important to make it plain—to drive it home—by copious quotations from the opinions of this court.

We are not concerned with limitations upon this power arising out of a previous contract between the Legislature and a particular corporation by which the right to exercise the power has been granted away in that particular instance, or due to Subdivision 3 of Section 8 of the United States Constitution, conferring power upon Congress to regulate commerce of a certain description. These limitations have always been recognized, and a considerable portion of the litigation in this court on this subject of rates has grown out of the attempt to apply this limitation of previous contract. Indeed, in the case of *Georgia R. R. & Banking Company* v. *Smith*, Mr. Justice Field called attention to the fact that "in almost every case which has been before this court, where the power of the state to regulate the rate of charges . . . has been under consideration the question discussed has not been the original power of the state over the subject, but whether that power had not been . . . surrendered to the company or been in some manner qualified." Since that decision was rendered the discussion has not been so limited, but has taken a much wider range. So far as the limitation imposed by the commerce clause of the Federal Constitution is concerned, it has been but little, if at all, involved in the cases which have arisen in this court.

But the contract limitation has relation to the conditions under which the power in question may be exercised,

and the commerce limitation has relation to the field or territory in which it may be exercised.

What we are concerned with is the limitation, if any, upon the power itself and that in relation to local or intrastate traffic.

That there is a limitation on the power itself within this field was first stated by Mr. Chief Justice Waite, who had made use of the broad expressions above quoted, in the case of *Stone* v. *Farmer's Loan & Trust Co.* He there said:

"From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state can not require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law."

According to this, then, the Legislature can not destroy or confiscate—can not require carrying of persons or property without reward—and can not do that which in law amounts to a taking of private property for public use without just compensation or without due process of law. The last limitation is quite indefinite and concerning it Mr. Chief Justice Waite said:

"What would have this effect, we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides that in all trials of cases brought for a violation of any tariff of charges, as fixed by the commission, it may be shown in defense that such tariff so fixed is unjust."

One might infer from this that the learned Chief Justice thought that if a tariff fixed was "unjust" then it amounted to a taking of private property for public use without just compensation or without due process of law. But whether so, or not, it would seem in his view what would amount to such a taking was something less than destruction, con-

fiscation or carrying without reward, inasmuch as it is mentioned as a limitation on the power to regulate in addition to those limitations.

This extract from the opinion of this court in that case was quoted with approval in the cases of *Dow* v. *Beidelman* and *Georgia R. R. & Banking Co.* v. *Smith*, and many subsequent cases. In the former case the contention of the railroad company was that the rate fixed by the Arkansas Legislature questioned therein was "unreasonable." Mr. Justice Gray, who delivered the opinion, pointed out that the court had no means of determining that it was unreasonable "if it would under any circumstances have the power," and continuing said: "Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law."

In the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*, Mr. Justice Blatchford said:

"The question of the reasonableness of a rate of charge for transportation by a railroad company, involving as it does the element of reasonableness both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring due process of law for its determination. If the company is deprived of the power of charging reasonable rates for the use of its property and such deprivation takes place in the absence of an investigation by judicial machinery, it is deprived of the lawful use of its property and thus, in substance and effect, of the property itself, without due process of law and in violation of the Constitution of the United States; and in so far as it is thus deprived, while other persons are permitted to receive reasonable profits upon their invested capital, the company is deprived of the equal protection of the laws."

According to this, the rates fixed or authorized to be fixed by the Legislature must be "reasonable," and if not, the act of fixing them amounts to a taking of property without due process of law and to a deprivation of equal protection of the laws and is invalid.

In the case of *Chicago & G. T. R. Co.* v. *Wellman*, Mr. Justice Brewer said:

"The Legislature has power to fix rates and the extent of judicial interference is protection against unreasonable rates."

In the case of *Budd* v. *State of New York*, Mr. Justice Blatchford, who delivered the opinion of the court in that case and in the Minnesota case, seems to draw a distinction between the power of the Legislature and of a commission acting under authority of the Legislature as to fixing rates and to intimate that whilst the latter could have no power to fix unreasonable rates, the former might have such power. He said:

"In the cases before us the records do not show that the charges fixed by the statutes are unreasonable, or that property has been taken without due process of law, or that there had been any denial of the equal protection of the laws; even if under any circumstances we could determine that the maximum rate fixed by the Legislature was unreasonable."

But he took care to say, in speaking of the power to regulate the charges involved in that case, that such power was not one "to destroy or a power to compel the doing of the services without reward, or to take property for public use without just compensation or without due process of law."

In the case of *Reagan* v. *Farmer's Loan & Trust Co.*, Mr. Justice Brewer states one of the questions involved in that case in these words:

"It appears from the bill that, in pursuance of the powers given to it by this act, the State Commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter

wholly within the power of the legislative department of the government and beyond examination by the courts."

He then proceeds to consider the defendant's contention, and after showing that it was untenable, both on principal and authority, he asks, and proceeds, at length, to consider this question:

"Were the rates, as proscribed by the commission, unjust and unreasonable?"

The result of this consideration is an affirmative answer, and because of it, this court affirmed the judgment below restraining the defendants from enforcing the rates already established.

In the case of *Covington & L. Turnpike Road Company* v. *Sandford*, Mr. Justice Harlan said:

"We have then the case of a corporation invested by its charter with authority to construct and maintain a turnpike road, and to collect tolls 'agreeable' to certain named rates, and which is required by a subsequent legislative enactment to conform to a tariff of rates that is unjust and unreasonable, and which also prevents it, out of its receipts, from maintaining its road in proper condition for public use, or from earning any dividends whatever for stockholders. These facts are admitted by the demurrer. Is such legislation forbidden by the clause of the Constitution of the United States declaring that no state shall deprive any person of property without due process of law? We are of opinion that, taking, as we must do, the allegations of the answer to be true, this question must be answered in the affirmative."

It was therefore held that that subsequent legislative enactment was invalid.

In the case of *Smyth* v. *Ames*, Mr. Justice Harlan said:

"A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroad that will not admit of the carrier earning such compensation as un-

der all the circumstances is just to it and to the public, would deprive such carrier of its property without due process of law, and deny to it the equal protection of the laws and would therefore be repugnant to the Fourteenth Amendment of the Constitution of the United States."

In this case, the justice and reasonableness of the rates prescribed by the Nebraska act involved therein were elaborately considered, and it being held that those rates, without reference to interstate business, were unjust and unreasonable, the act was held invalid.

In the case of *San Diego, etc.*, v. *National City*, Mr. Justice Harlan said:

"That it was competent for the state of California to declare that the use of all water appropriated for sale, rental or distribution should be a public use and subject to public regulation and control, and that it could confer upon the proper municipal corporation power to fix rates of compensation to be collected for the use of water supplied to any city, county or town, or to the inhabitants thereof, is not disputed, and is not, as we think, to be doubted. It is equally clear that this power could not be exercised arbitrarily and without reference to what was just and reasonable as between the public and those who appropriated water and supplied it for general use; for the state can not by any of its agencies, legislative, executive or judicial, withhold from the owners of private property just compensation for its use. That would be a deprivation of property without due process of law."

And in the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, the last deliverance of this court on this subject, Mr. Justice Brewer said:

"It is often said that the Legislature is presumed to act with full knowledge of the facts upon which its legislation is based. This is undoubtedly true, but when it is assumed from that that its judgment upon those facts is not subject to investigation, the inference is carried too far. Doubtless upon mere questions of policy its conclusions are beyond judicial consideration. Courts may not inquire whether any given act is wise or unwise, and only when such act trespasses upon vested rights may the courts in-

tervene. A single illustration will make this clear: It is within the competency of the Legislature to determine when and what property shall be taken for public uses. That question is one of policy over which the courts have no supervision; but if, after determining that certain property shall be taken for public uses, the Legislature proceeds further, and declares that only a certain price shall be paid for it, then the owner may challenge the validity of that part of the act, may contend that his property is taken without due compensation; and the legislative determination of value does not preclude an investigation in the proper judicial tribunals. The same principle applies when vested rights of property are disturbed by a legislalative enactment in respect to rates."

These authorities are sufficient to leave no room for claiming at this late day that the Legislature has unlimited power to fix local rates, or in conferring authority on a commission to fix them. It is practically certain that it will not be claimed that it has such power. The rates fixed must be just and reasonable—or, at least, they must not be "so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as, under all the circumstances, is just both to the owner and to the public." This limitation on legislative power exists. It is not very definite, and this court has recognized that it is extremely difficult to apply to any specific case. No general rules exist governing its application. As has been said, "each case must depend upon its special facts." But though this is so, the existence of the limitation on the legislative power is as certain as the legislative power itself; and that equally so, whether it acts directly or through a commission. No difference exists in this particular between the two modes of action. In the case of *Reagan* v. *Farmer's Loan & Trust Company*, it was held that the power to fix rates had been exceeded by a commission in that it had fixed unreasonable and unjust rates; and in the cases of *Covington & L. Turn-*

pike Road Company v. *Sandford* and *Smyth* v. *Ames*, it was held that that power had been exceeded in each instance by the Legislature itself in that it had fixed unreasonable and unjust rates.

We are now prepared to take another step forward.

2d. The courts have the power and the right to inquire and determine whether the Legislature or commission, as the case may be, has exceeded its power in the fixing of the rates and fixed rates that are unreasonable and unjust, and, if the result of the inquiry is a determination that the power has been exceeded, to declare the rates so fixed invalid and enjoin their enforcement, and in so doing, they exercise a judicial function.

This proposition follows necessarily from the foregoing proposition. But we are not left to inference. It has been expressly recognized by this court in the opinions in many of the cases referred to above, as shown by some extracts therein already quoted.

Further extracts can be made to the same effect. In the case of *Reagan* v. *Farmer's Loan & Trust Company*, Mr. Justice Brewer said:

"The courts are not authorized to revise or change the body of rates imposed by a Legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they donot engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a Legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation."

And again:

"These cases all support the proposition that while it is not the province of the courts to enter upon the merelr administrative duty of framing a tariff of rates for cayriage, it is within the scope of judicial power and a part

of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all the owners of other property."

In the case of *St. Louis & S. F. R. Co.* v. *Gill*, Mr. Justice Shiras said:

"This court has declared, in several cases, that there is a remedy in the courts for relief against legislation establishing a tariff of rates which is so unreasonable as to practically destroy the value of property of companies engaged in the carrying business, and that especially may the courts of the United States treat such a question as a judicial one, and hold such acts of legislation to be in conflict with the Constitution of the United States, as depriving the companies of their property without due process of law, and as depriving them of the equal protection of the laws."

In the case of *Smyth* v. *Ames*, Mr. Justice Harlan said:

"While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, can not be so conclusively determined by the Legislature of the State, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

In the case of *San Diego L. & T. Co.* v. *National City*, Mr. Justice Harlan said:

"In view of these principles, can it be said that the rates in question are so unreasonable as to call for judicial interference in behalf of the appellant? Such a question is always an embarrassing one to a judicial tribunal, because it is primarily for the determination of the Legislature or of some public agency designated by it. But when it is alleged that a state enactment invades or destroys rights secured by the Constitution of the United States a judicial question arises, and the courts, Federal

and state, must meet the issue, taking care always not to entrench upon the authority belonging to a different department, nor to disregard a statute unless it be unmistakably repugnant to the fundamental law."

In the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, Mr. Justice Brewer said:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a state legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws, and not of men."

And again:

"When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, state or nation, without any right of appeal to the courts, is one which can not for a moment be tolerated. Difficult as are the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

As to the exercise of this power by the judiciary Mr. Justice Brewer in the case of *Reagan* v. *Farmers' Loan & Trust Company*, says:

"There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body or the public as a whole) operates to divest the other party of any rights of person or property. In every Constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of an-

other, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held."

As to what sort of a case is necessary to be made out in order to justify the courts in overthrowing the rates fixed, Mr. Justice Harlan, in the case of *San Diego L. & T. Co.* v. *National City*, said:

"But it should also be remembered that the judiciary ought not to interfere with the collection of rates established under legislative sanction unless they are so plainly and palpably unreasonable as to make their enforcement equivalent to the taking of property for public use without such compensation as under all the circumstances is just both to the owner and to the public; that is, judicial interference should never occur unless the case presents, clearly and beyond doubt, such a flagrant attack upon the rights of property under the guise of regulations as to compel the court to say that the rates prescribed will necessarily have the effect to deny just compensation for private property taken for the public use."

And Mr. Justice Brewer, in the case of *Chicago, M. & St. P. R. Co.* v. *Tompkins*, said:

"In approaching the consideration of a case of this kind we start with the presumption that the act of the Legislature is valid, and upon any company seeking to challenge its validity rests the burden of proving that it infringes the constitutional guaranty of protection to property. The case must be a clear one in behalf of the railroad company or the legislation of the state must be upheld."

Though in the case of *Reagan* v. *Farmer's Loan & Trust Company*, the same learned Justice seemed to put a rate fixed by the Legislature or a commission on a par with a

rate fixed by a carrier when its rate was being investigated. He there said:

"It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the Legislature, instead of the carrier, prescribes the rates."

It was in the exercise of this power that this court invalidated the rates involved in the three cases of *Reagan* v. *Farmer's Loan & Trust Co.*, *Covington & L. Turnpike Company* v. *Sandford* and *Smyth* v. *Ames*.

This power and right in the judiciary which is an absolute power and right, without condition or limitation, being conceded and established, we are prepared to make another advance.

3d. The Legislature, having a limited power over the subject of rates, and the judiciary, having an absolute power and right to determine whether rates fixed by the Legislature, or under its authority, are unreasonable and unjust, the Legislature can not take away this power and right or curtail it in any respect. This proposition is really not an advance upon the preceding propositions, as it is involved in them. It is though an advance on the form of statement and has the advantage of bringing to the light and stating expressly that which is involved in what has gone before. By no sort of device or provision of law can the Legislature take away or curtail, in any respect, this power and right. For if it can, its power is absolute and not limited, and the power and right of the judiciary is not absolute to the ex-

tent stated, neither of which propositions is true, as we have seen. The Legislature can not expressly provide that the judiciary can not consider and determine whether rates fixed by it or under its authority are unreasonable and unjust. It can not provide that rates fixed by it or authorized to be fixed by it shall be final and conclusive upon the judiciary. It can not provide a specific remedy for the enforcement by the judiciary of the rates so fixed, and require the judiciary to enforce them, irrespective of their reasonableness and justice. If it does provide a remedy for their enforcement by the judiciary, it must leave room, in the proceeding so authorized, for the latter to consider their reasonableness and justice, and if it determines that they are unreasonable and unjust to refuse to enforce them, in that proceeding, and thus render the proceeding unavailing, as a method of enforcing the rates in question. It is not sufficient that the rates may be overthrown in other proceedings instituted by the party affected. The right to overthrow them must exist in the very proceeding in which they are sought to be enforced. Otherwise, the power of the judiciary is limited and curtailed, which, as we have seen, can not be. It seems to us that it is not possible to pick any flaw in this argument and it is not without support in the decisions of this court. In the case of *Smyth* v. *Ames*, Mr. Justice Harlan, most vigorously, said:

"But, despite the difficulties that confessedly attend the proper solution of such questions, the court can not shrink from the duty to determine whether it be true, as alleged, that the Nebraska statute invades or destroys rights secured by the supreme law of the land. No one, we take it, will contend that a state enactment is in harmony with that law simply because the Legislature of the state has declared such to be the case, for that would make the state Legislature the final judge of the validity of its enactment, although the Constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, anything in the constitution or laws of any state to

the contrary notwithstanding. The idea that any legislature, state or Federal, can conclusively determine for the people and for the courts that what it enacts in the form of law, or what it authorizes its agents to do, is consistent with the fundamental law, is in opposition to the theory of our institutions. The duty rests upon all courts, Federal and state, when their jurisdiction is properly invoked, to see to it that no right secured by the supreme law of the land is impaired or destroyed by legislation. This function and duty of the judiciary distinguishes the American system from all other systems of government. The perpetuity of our institutions and the liberty which is enjoyed under them depend, in no small degree, upon the power given to the judiciary to declare null and void all legislation that is clearly repugnant to the supreme law of the land."

And the point was distinctly in issue and disposed of in the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*. The Minnesota act of 1887 authorized a commission to fix rates and to institute proceedings in the Supreme Court of the state in mandamus, against the party affected by them, to put them in force. It did not permit that party to question the reasonableness and justice of the rates fixed in the mandamus proceeding. On the contrary, it was the intention of the Legislature that such party should not have a right to raise such question therein, but that the rates fixed by the commission should be final and conclusive, and that all the Supreme Court should have to do in the matter was to compel obedience to them. Some tenderfootedness has been shown in subsequent decisions of this court in accepting such to be the true construction of the act in question in that case, and there is room to suspect a disposition to blame the Supreme Court of Minnesota for that construction, by calling attention to the fact that this court was not responsible for it. As for example, in the case of *San Diego L. & T. Co.* v. *National City*, Mr. Justice Harlan said:

"Observe that this court based its interpretation of the statute of Minnesota upon the construction given to it by the Supreme Court of that state."

But why was not that the true construction of the statute? We submit that it was and that it is impossible to get away from the reasoning of the court so holding. It was the province of that court to construe that statute and its construction was the true intent and meaning of the statute, so far as this court was concerned, and that was an end of the matter. This, however, by the wayside. Such being the true intent and meaning of the statute, it was held unconstitutional. Mr. Justice Blatchford said:

"The construction put upon the statute by the Supreme Court of Minnesota must be accepted by this court, for the purposes of the present case, as conclusive and not to be re-examined here as to its propriety or accuracy. The Supreme Court authoritatively declares that it is the expressed intention of the Legislature of Minnesota, by the statute, that the rates recommended and published by the commission, if it proceeds in the manner pointed out by the act, are not simply advisory, nor merely *prima facie* equal and reasonable, but final and conclusive as to what are equal and reasonable charges; that the law neither contemplates nor allows any issue to be made or inquiry to be had as to their equality or reasonableness in fact; that, under the statute, the rates published by the commission are the only ones that are lawful, and therefore in contemplation of law the only ones that are equal and reasonable; and that, in a proceeding for a mandamus under the statute, there is no fact to traverse except the violation of law in not complying with the recommendations of the commission. In other words, although the railroad company is forbidden to establish rates that are not equal and reasonable, there is no power in the courts to stay the hands of the commission, if it chooses to establish rates that are unequal and unreasonable.

"This being the construction of the statute by which we are bound in considering the present case, we are of opinion that, so construed, it conflicts with the Constitution of the United States in the particulars complained of by the railroad company. It deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes there-

for, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, can not be regarded as clothed with judicial functions or possessing the machinery of a court of justice."

There is no gainsaying the correctness of this statement of the law. In the subsequent case of *Budd* v. *State of New York*, Mr. Justice Blatchford showed a disposition to limit it to a case where the rates were fixed by a commission and to hold that it had no application to a case where they had been fixed by the Legislature itself. He said, for example:

"What was said in the opinion in 134 U. S., as to the question of the reasonableness of the rate of charge being one for judicial investigation, had no reference to a case where the rates are prescribed by the Legislature."

This attempt at a distinction between the two classes of cases is to be traced to the lingering influence of the broad statements in the Munn and "Granger" cases, and Mr. Justice Bradley's dissenting opinion in the Minnesota case, as to the absolute power of the Legislature in fixing rates. It has no more absolute power to fix rates than it has power to confer absolute power on a commission. And the judiciary has absolute power to consider the reasonableness and justice of rates fixed by the Legislature, as much as it has such power as to rates fixed by a commission. The cases of *Covington & L. Turnpike Road Company* v. *Sandford*, and *Smyth* v. *Ames*, following in the track of *Reagan* v. *Farmer's Loan & Trust Company*, settle this. There is no such distinction, we submit, between the two classes of cases.

4th. The Legislature being powerless to take away this power and right of the judiciary to inquire into and determine the reasonableness and justice of the rates fixed, it can not be claimed that they are final and conclusive on the judiciary for any portion of time after being so fixed.

As, for example, they can not be claimed to be final and conclusive until the common carrier affected by them has filed a bill in chancery in a proper forum to have them adjudged invalid, much less until they have been so adjudged. No doubt exists as to the right of the common carrier to institute such proceedings, but the penalty of not instituting them is not submission to the rates and to any attempt to enforce them against it. If such attempt is made, it has the right in the proceedings, in which the attempt to enforce them is made, to question their validity and to ask the court, as appealed to, to adjudge them invalid if the facts so warrant. To hold otherwise is to deny absolute power and right in the judiciary to consider and determine the reasonableness and justice of rates fixed and to concede that the Legislature can, to some extent, curtail it. Hence, we submit that Mr. Justice Miller was in error in his dissenting opinion in the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*, when he said:

"That the proper, if not the only mode of judicial relief against the tariff of rates established by the Legislature or by its commission, is by a bill in chancery asserting its unreasonable character and its conflict with the Constitution of the United States, and asking a decree of court forbidding the corporation from exacting such fare as excessive, or establishing its right to collect the rates as being within the limits of a just compensation for the service rendered.

"That until this is done it is not competent for each individual having dealings with the carrying corporation, or for the corporation with regard to each individual who demands its services, to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

He, at once, conceded away his suggestion that a bill in chancery might be the only mode of judicial relief against a tariff of rates by holding that in the mandamus proceedings involved in that case the court had "the same right and duty to inquire into the reasonableness of the tariff of

rates established by the commission before granting such relief, that it would have if called upon so to do by a bill in chancery." He so held because such a proceeding was "equivalent" to a bill in chancery. But, the real ground for so holding is the absolute power of the judiciary to so inquire without interference on the part of the Legislature, in any way, or to any extent. This ground demands also that the common carrier should have the right to raise a contest in the courts as to the reasonableness of the rates fixed in any proceeding of any character or description in which the aid of the court is sought to enforce them to any extent; at least, in any proceedings which the Legislature provides by statute for their enforcement. Hence, also, we submit that Mr. Justice Shiras' qualification of Mr. Justice Miller's position in the case of *St. Louis & S. F. R. Co.* v. *Gill*, is equally untenable. He there said:

"Sometimes in acting on this subject the state legislatures have created commissions or boards of public works, with power to establish rates for the transportation of passengers and freight, and in such instances the course recommended by Mr. Justice Miller, already cited, may well be followed—that the remedy for a tariff alleged to be unreasonable should be sought in a bill in equity or some equivalent proceeding, wherein the rights of the public as well as those of the company complaining can be protected.

"But there are other cases, and the present is one, where the legislatures choose to act directly on the subject by themselves establishing a tariff of rates and prescribing penalties. In such cases there is no opportunity to resort to a compendious remedy, such as a proceeding in equity, because there is no public functionary or commission which can be made to respond, and therefore, if the companies are to have any relief it must be found in a right to raise the question of the reasonableness of the statutory rates by way of defense to an action for the collection of the penalties."

He thus denies the application of Mr. Justice Miller's position to a case of rates fixed directly by the Legislature because of a supposed lack of opportunity to raise the

question of their reasonableness, in such a case, by bill in equity. But suppose the Legislature not only fixes rates and prescribes penalties, but provides that the penalties prescribed shall be adjudged against the common carrier only in proceedings instituted by a commission. Is there not an opportunity in such a case to raise the question by bill in equity, and, if so, would, or not, Mr. Justice Miller's position apply thereto? The truth is, that it is not lack of opportunity to raise the question of their reasonableness by bill in equity where the rates have been fixed by the Legislature itself, which is the real ground why, in such a case, the common carrier has a right to raise the question by way of defense to a statutory or other proceeding to enforce them, and is not bound to resort to such a bill. It is because of the absolute power of the judiciary to inquire into and determine that question whenever its aid is invoked in this way. Why should the fact that the question can be raised by bill in chancery filed by the common carrier, where opportunity exists to do so, deprive the common carrier, in proceedings statutory or otherwise, instituted against it to enforce the rates, to raise the question by way of defense to such proceedings. Mr. Justice Miller concedes that that fact does not deprive it of the right to raise that question in that way in mandamus proceedings. Then why should it have the effect of depriving it of such right in any other duly authorized proceeding brought to enforce them? It must be either because the Legislature has some control over the judiciary in this particular or because the judiciary has power to decline to exercise some part of its jurisdiction when properly called on to do so, neither of which alternatives, we submit, is true.

This leads us to direct attention to the phraseology in which the right of a common carrier as to rates fixed by the Legislature or by a commission under its authority should be stated. Unless correctly stated, it is liable to be the

source of confusion and error what its real right is. It is frequently stated that it is a right to a judicial hearing as to the reasonableness of the rates so fixed. It is certainly that, but if that is all it is, then an opening is left for falling into the position of Mr. Justice Miller, as qualified by Mr. Justice Shiras—that where the common carrier has an opportunity to file a bill in chancery raising the question as to the reasonableness of the rates so fixed, it can not raise it by way of defense in proceedings instituted against it to enforce those rates, except in mandamus proceedings; for in that way it can get a judicial hearing. But that way of stating its right is too indefinite. It is a right to a judicial hearing not only in a court of chancery, where, having an equity, it can, on its own motion, bring the matter, but in any court where those rates are sought to be enforced against it, whether it has brought a suit in chancery or not.

This, we submit, necessarily grows out of the correctness of the positions which we have heretofore advanced and attempted to maintain.

5th. The power of the Legislature on subject of rates being limited to the extent stated and the judiciary having absolute power to inquire and determine whether the limit has been exceeded, it follows that the Legislature can not take it away or curtail it by any investigation which it may make into the matter of rates, or require to be made by a commission before it can exercise authority conferred on it to fix them. It may give the common carrier affected the fullest hearing possible before it, or its committees, before fixing the rates itself, or it may provide for such a hearing before a commission before that body is empowered to fix rates, but it can not make such a hearing before it or its committees or before the commission a basis of denying to the judiciary the power to investigate the matter for itself, otherwise it has not the absolute power claimed for it. It may be that if it provides for the fixing of rates by

a commission, it should also provide for notice of its sessions, at which the rates are to be fixed, and for a hearing by the common carriers affected. Mr. Justice Blatchford seems to intimate this in *Chicago, M. & St. P. R. Co.* v. *State of Minnesota*. He said:

"No hearing is provided for, no summons or notice to the company before the commission has found what it is to find and declared what it is to declare, no opportunity provided for the company to introduce witnesses before the commission, in fact, nothing which has the semblance of due process of law; and, although in the present case, it appears that, prior to the decision of the commission, the company appeared before it, by its agent, and the commission investigated the rates charged by the company for transporting milk, yet it does not appear what the character of the investigation was, or how the result was arrived at."

But we are not concerned with maintaining the correctness of this position. The point we are urging is, that a hearing before any other body or organization, no matter how full and ample, is not and can not be made a substitute for the judicial investigation and hearing which the common carrier is entitled to. There is nothing in the case of *San Diego L. & T. Co.* v. *National City* to the contrary of this. A part of the town company's contention in that case is thus stated by Mr. Justice Harlan:

"It is said that the State Constitution and laws authorized rates to be established without previous notice to the corporation or person immediately interested in the matter, and without hearing in any form, and therefore were repugnant to the clause of the Federal Constitution declaring that no state shall deprive any person of property without due process of law."

In other words, the want of hearing complained of therein was a hearing before the body empowered by the California laws to fix rates, and no doubt the statement quoted from Mr. Justice Blatchford's opinion in the Minnesota case was relied on in support of the complaint. It was

this contention that Mr. Justice Harlan combatted in a portion of his opinion in that case, and which he held to be untenable. It was not a question in that case whether, because of the hearing which it was held was provided for before that body, in those laws, the town company did not have a right to be heard again in the courts as to the reasonableness of the rates fixed. On the contrary, another contention of the town company, in that case, was that the rates fixed were unreasonable, and this court considered and disposed of that contention also, and there was no intimation, from any quarter, that it did not have the right to do so.

A direct authority in support of the position, we are now endeavoring to maintain, is the recent case of

Western Union Tel. Co. v. *Myatt*, 98 Fed., 335.

The act of January 3d, 1899, passed by the Kansas Legislature, created a body which it termed a court of visitation, and gave it power to regulate the business of railroad and telegraph lines within that state, and, amongst other things, to prescribe schedules of rates and to determine the reasonableness of such rates in proceedings had before it upon due notice and opportunity to be heard, and heavy penalties were provided for charging rates in excess of rates adjudged by it to be reasonable.

It was held in that case that the body created by it, though termed a court, was a legislative and administrative body, and that the right of the judiciary to consider and determine the reasonableness of the rates fixed could not be ousted in this way.

Hook, District Judge, said:

"I am, therefore, of the opinion that a proceeding before the court of visitation, in which it is sought to secure a judgment upon the reasonableness of a body of rates prescribed by it to be charged by a railroad or telegraph company, would not be due process of law within the meaning of the Federal Constitution."

This conclusion is a deduction from this admirable and concise statement of the law on the subject of rates made by him in a former part of his opinion:

"Concisely stated, to prescribe a tariff of rates and charges is a legislative function; to determine whether existing and prescribed rates and charges are unreasonable is a judicial function. That this is the settled doctrine in this country is no longer open to question. It is firmly fixed in the body of our jurisprudence (*Reagan* v. *Trust Co.*, 154 U. S., 362; 14 Sup. Ct., 1047; 38 L. Ed., 1014; *Smyth* v. *Ames*, 169 U. S., 466; 18 Sup. Ct., 418; 42 L. Ed., 819). It follows, therefore, as a corollary of this doctrine, that courts have no power to prescribe a schedule of rates and charges for persons engaged in a public or *quasi* public service, because that is a legislative prerogative, and that the Legislature has no power to forestall the judgment of the courts by declaring that a tariff or schedule prescribed by it is a finality, and thus prevent an inquiry into the reasonableness thereof by the courts in a controversy properly challenging such reasonableness. The legislative prerogative is the power to make the law—to prescribe the regulation or rule of action. The jurisdiction of the courts is to construe and apply the law or regulation after it is made. The two functions are essentially and vitally different."

The result of the whole matter then is that in any proceedings in court against a common carrier to enforce rates fixed by the Legislature or a commission, the common carrier has the right to have that court, in that proceeding, to consider and determine whether the rates, so fixed, are unreasonable and unjust, and if it so determines to refuse to enforce them, and that its right so to do is not at all affected by the fact that it has a right and an opportunity to bring the matter into chancery on its own motion by bill in equity or by the further fact that the rates have been fixed after the fullest investigation and opportunity to be heard by the Legislature or commission, as the case may be. And as stated by Mr. Justice Brewer in the Texas case, there is nothing "new or strange" in this.

6th. If, then, the Legislature, by an act duly passed, fixes rates or authorizes a commission to fix them, and provides further that the common carrier shall be subject to a penalty if it charges rates in excess of those so fixed, and does not permit the common carrier, in the proceeding, to recover the penalty to raise the question as to the reasonableness of the rates fixed, *i. e.*, expressly provides that that question shall not be raised therein, or omits to so provide, intending that it shall not be raised therein, but that the penalty shall be affixed and the rates thus enforced irrespective of that question, the Legislature has denied the common carrier its right and exceeded its constitutional power.

It is not up now whether, in any particular instance, the Legislature has so acted. That question will arise further on. It is well to dispose of one thing at a time. The position now taken is that, if the Legislature has so acted, its action is unconstitutional. This is the proposition advanced in the beginning, and which we have undertaken to maintain. We submit that it is the necessary conclusion to be drawn from what has been heretofore said. It has not been directly laid down in any of the cases on the subject of rates decided by this court, but it is a necessary deduction from them. The question as to the validity of the proposition, has been hinted at, in some of them, but a decision of it has been expressly waived as not necessary to the proper disposition of those cases.

As, for example, in the case of *Spring Valley Water Works* v. *Schlotter*, arising under the California Constitution and statutes, with reference to water rates, the same considered in the late case of *San Diego L. & T. Co.* v. *National City*, Mr. Chief Justice Waite said:

"The question before us is not as to penalties to be inflicted on the company for a failure to sell at the prices fixed, but as to the power to fix the price."

And in the case of *Reagan* v. *Farmer's Loan & Trust Company*, involving the Texas statute, Mr. Justice Brewer states, as amongst the objections urged against it, the following:

"Specific objections are made to the act on the ground that, by Section 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by Section 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that the railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable and oppressive regulations may be prescribed by the commission."

Concerning these objections, he had this to say:

"We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions, and if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged—that which establishes the commission and empowers it to

make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the Legislature would not have enacted that which is within, independently of that beyond its power. Applying this rule, and the invalidity of these two provisions may be conceded without impairing the force of the rest of the act. The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the Legislature would not have established the commission and given it power over railroads without these independent matters. In other words, it is not to be presumed that the Legislature was legislating for the mere sake of imposing penalties, but the penalties and the provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the Legislature in its enactment. Take a similar body of legislation—a tax law. There may be incorporated under such a law a provision giving conclusive effect to tax deeds and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the state depended for its validity upon the penalties for non-payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that the two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration."

But it does seem to us that the case of *Chicago, M. & St. P. R. Co.* v. *State of Minnesota* decides the question squarely, though it does not come up in that case in the exact form in which it does in the supposed case under consideration. The Minnesota statute required the Supreme Court of that state to compel the common carriers affected to charge the rates fixed by the commission created by it by writ of mandamus. In the supposed case under consideration the legislative act requires the court given jurisdiction of the matter to assess a fine against the common carrier charging rates in excess of those fixed by it or by its commission, thus indirectly compelling submission thereto and compliance therewith. The only difference between the two cases is in the form of the compulsion. In the one, it is direct; in the other, indirect. If the intention of the Legislature in the one case that the common carrier should not be permitted to question the reasonableness of the rates fixed in the mandamus proceeding invalidating that act, a like intention in the other case, as to the penal proceeding, should invalidate the latter act.

It may be claimed, however, that the cases of *Dow* v. *Beidelman* and *St. Louis & S. F. R. Co.* v. *Gill*, arising under the Arkansas statute, and *Budd* v. *State of New York*, arising under the New York statute, are direct authorities against our contention. Each statute was a case of rates fixed by the Legislature itself—the Arkansas statute relating to passenger rates and the New York statute to elevator charges. In the one case the passenger affected was authorized to recover a penalty for an overcharge, and in the other provision was made for assessing a fine in criminal proceedings for the overcharge. The two Arkansas cases were appeals from judgments adjudging the statutory penalty in favor of the passengers, who sued therein, and the New York case was an appeal from a judgment assessing the statutory fine in favor of the state. In each case this

court affirmed the judgment appealed from. It appears that the New York statute contained no express provision permitting the reasonableness of the rate fixed to be questioned in the criminal proceeding to recover the fine. Whether the Arkansas statute was similar to the New York statute in this respect we are not in a position to say, as its provisions are not before us.

Concerning these decisions we have this to say: In the first place they were rendered at a time when this court, or at least certain members of it, seem to have been impressed with the idea that there was a distinction between a case of rates fixed by the Legislature and a case of rates fixed by a commission under authority of the Legislature, as to the power of the courts to inquire into the reasonableness of the rates fixed, with an inclination to hold that that power was less in the former case than in the latter, and the statutes involved in those decisions were both cases where the rates had been fixed by the Legislature itself.

As for example, in the case of *Dow* v. *Beidelman*, Mr. Justice Gray said:

"The court has no means, if it would, under any circumstances, have the power of determining that the rate of three cents a mile, fixed by the Legislature, is unreasonable."

And in the case of *Budd* v. *New York*, Mr. Justice Blatchford said:

"In the cases before us, the records do not show that the charges fixed by the statute are unreasonable, or that property has been taken without due process of law, or that there has been any denial of the equal protection of the laws; even if, under any circumstances, we could determine that the maximum rate fixed by the Legislature was unreasonable."

Since then, however, this court has applied the doctrine of the Minnesota and the Texas cases, which were commission cases, to the case of rates fixed by the Legislature in

two distinct decisions, the one being that of *Covington & L. Turnpike* v. *Sandford*, where a Kentucky turnpike statute was invalidated, and the other that of *Smyth* v. *Ames*, where the Nebraska statute, fixing maximum railroad rates, was overthrown, so that there is no longer any room for contention as to there being a difference between the two classes of cases in the matter of the right and duty of the courts to consider the reasonableness of the rates fixed, and if found to be unreasonable, to overthrow them.

But again, in neither of the decisions referred to, was the point made that it was the intention of the Legislature, by the provisions of the act in question, therein, to deny, to the parties affected thereby, the right to question the reasonableness of the rates fixed in the statutory proceeding provided, and that for that reason, the provision prescribing penalties was invalid. The only question discussed was as to the right to fix rates, at all, and as to whether those fixed were reasonable. If that point was necessarily involved and disposed of in those cases adversely to our contention, there is nothing in the opinions of this court to show that it was conscious of it, and at least, the point was not argued and fully presented before this court. It is, therefore, a clear case where the doctrine of *stare decisis* should not apply. A good statement, as to the conditions under which that doctrine does not apply, may be found in the following extract from the opinion of O'Brien, J., in the case of

Rumsey v. *Railroad Company*, 133 N. Y., 79.

He said:

"It is no doubt true that even a single adjudication of this court, upon a question properly before it, is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of *stare decisis*, like almost every other legal rule, is not

without exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of courts to re-examine the question. Chancellor Kent, commenting on the rule of *stare decisis*, said that more than one thousand cases could then be pointed out, in the English and American reports, which had been overruled, doubted, or limited. He added that it is probable that the records of many of the courts of this country are replete with hasty, crude decisions, and such cases ought to be examined without fear, and revised without reluctance, rather than have the character of our law impaired, and the beauty and harmony of the system destroyed by the perpetuity of error."

But particularly the unconscious decision in those cases of the point in question adversely to our contention, if there be such a decision in them, should not prevail against us when it is in conflict with the principles laid down by this court in the rate cases, and especially in the Minnesota case, upon full discussion and consideration. The "beauty and harmony" of the law, as a system, requires that they should give way, if they are in the way.

The matter has been decided directly in accordance with our contention in the lower Federal courts. In the case of

Richmond & D. R. Co. v. *Trammel*, 53 Fed., 196,

the Georgia statute involved in *Georgia R. R. & Banking Co.* v. *Smith*, in this court, was under consideration. It was a suit in equity by the complaining railroad company against Georgia Railroad Commission to enjoin them from instituting suits to collect penalties for alleged violations of a certain freight rate established by the commission. The Georgia act conferred power on the commission to fix rates and provided penalties for charging rates in excess of those fixed by it. It further provided that, in suits brought against any railroad corporation, wherein was involved the

charges of such railroad corporation for the transportation of any passenger, freight or car, the schedule of rates established by the commission should "be deemed and taken in all courts in this state as sufficient evidence that the rates therein fixed are just and reasonable rates of charges for transportation of passengers and freight and cost upon the railroads." The complaining railroad company contended that the portion of the act prescribing penalties was invalid because, by virtue of the provision referred to, it would not have an opportunity in the suits which the railroad commission proposed to institute, to enforce the penalties against it to show that the rates, which had been fixed by it, were unreasonable and unjust, it being claimed that the words "sufficient evidence" meant "conclusive evidence."

Newman, District Judge, thus put one of the questions in the case:

"If the rate is not reasonable and just, will the railroad company have an opportunity to show this before the penalties are enforced against it, under the peculiar provisions of the act of 1879, making the schedule sufficient evidence of its reasonableness?"

He then states that the case mainly relied upon by the complainant was the Minnesota case, and after quoting therefrom, he says:

"The effect of this decision by a majority of the Supreme Court of the United States is that the question of the reasonableness of a rate fixed by a railroad commission is one for judicial determination."

In answer to defendant's contention that that case should be restricted "to the case made by the Minnesota statute and the peculiar facts existing there," he said:

"The principle announced is too clear and the rule laid down is too broad to be thus restricted."

And in answer to the further contention that the de-

cision in *Budd* v. *State of New York* was "a departure from the Minnesota case," and after quoting the language of that decision in relation to that case, he said:

"There is nothing in this language to justify the argument that the Supreme Court intended any departure from the rule announced in the Minnesota case, namely, that where a railroad commission had authority to fix just and reasonable rates, the question of their reasonableness is one for judicial investigation."

And he thus concludes:

"So it seems clear that the rule laid down in the Minnesota case is the proper rule to be applied in this case, and when correctly applied, should control it."

In the application of it, however, he concludes that the words "sufficient evidence" did not necessarily mean "conclusive evidence," and that there was reason for thinking that the Supreme Court of Georgia would hold that it meant "satisfactory evidence," or "*prima facie* evidence." He said:

"The Supreme Court of the United States declares, in the Minnesota case, that it is a constitutional right of a railroad company, when sued for violation of rates of transportation as fixed by a railroad commission, to have a hearing, and offer evidence as to the reasonableness of such rates. The Supreme Court of Georgia says that 'powers of the railroad commission must be exercised within legal and constitutional limitations.' It is evident, therefore, that if any other construction can be given the term 'sufficient evidence' than that it is conclusive evidence, the courts of the state will adopt that construction which will not deprive the complainant, or any other railroad company, of its constitutional rights to a hearing; and this court is not sufficiently convinced that the state courts will be compelled to rule against the railroad companies as to the right to offer evidence to justify it in granting the injunction here prayed for on this assumption. Certainly the courts of the state will, if it can be done, give the term in question a construction consistent with its constitutionality, and which will allow the railroad company a full hearing as to the reasonableness of the rate fixed by the commission."

In the case of

Southern Pac. Co v. *Board of Railroad Com'rs*, 78 Fed., 236,

the provisions of California Constitution in relation to a commission to fix railroad rates and legislation in pursuance thereof was involved. Heavy penalties were provided for as against any railroad corporation charging rates in excess of what might be fixed by the commission and it was expressly provided that "in all controversies, civil or criminal, the rates of fares and freights established by said commission shall be deemed conclusively just and reasonable." It was held that this latter provision was unconstitutional under the authority of the Minnesota case.

The conclusion of the whole matter then is that, if a legislative act prescribing penalties for charging rates in excess of those fixed by the Legislature or commission, as the case may be, does not permit the party affected thereby to question the reasonableness of the rates fixed in the proceedings to enforce the penalties, which it may do either by expressly providing that the rates shall not be questioned, but shall be conclusive therein, or by omitting to expressly provide that they may be questioned therein, the intention on the part of the Legislature being that they shall not be questioned, but inflicted, whether or no, upon proof of guilt of charging the excess rates, the act is invalid. The fact that the party to be affected may enjoin the enforcement of rates after they have been fixed, if they are unjust and unreasonable, by bill in equity, does not prevent its being invalid, nor deprive the party to be affected of the right to enjoin the fixing of rates at all before anything has been done, if it has opportunity to do so, and the power to fix rates goes down with the invalid portion of the act; nor does the fact that the party affected had an opportunity to be heard before the Legislature or commission prevent such portion of the act being invalid,

or deprive it of the right to such injunction under the circumstances stated.

We have considered the matter as if the law where rates are fixed by the Legislature itself was the same as where fixed by a commission, which we consider to be the present condition of the law as laid down by this court. If, however, there is a difference between the two cases in that the judiciary has less power over the rates fixed in the one case than it has in the other, we would direct attention to the fact that this is a case of rates authorized to be fixed by a commission.

But before leaving this branch of our argument, it may be well for us to say something in response to some suggestions of counsel for appellants which may tend to confuse matters, and therefore need clearing away.

In the first place, they state our contention to be that a common carrier is entitled to a judicial hearing, as to rates to be fixed before the rates are fixed, and that we base this doctrine upon the Minnesota case. No such position is advanced herein. Counsel are merely setting up a man of straw, in order that they may readily knock it down again. The contention is that after rates have been fixed by the Legislature or a commission, the common carrier has a right to a judicial hearing as to the reasonableness thereof; and that in the statutory proceeding, if any, which may be provided for the enforcement of the rates so fixed, and if the Legislature attempts, in any way, to deny or to curtail this right, the act is, at least, in so far unconstitutional. And the Minnesota case is relied on in support of this proposition, and none other. Counsel concede that it supports this contention in part, but they have failed to appreciate its full bearing. They say that it lays down the doctrine that the common carrier is entitled to a judicial investigation, and that a law which denies it that right is unconstitutional. But it goes farther, and holds that the

common carrier is entitled to a judicial hearing in the very proceeding authorized to enforce the rates fixed, and that a law which denies it the right to be heard in that proceeding is unconstitutional. There the statute of Minnesota provided that the Supreme Court of the state should compel the common carrier affected by the rates fixed by the commission to charge them, whether or no, and denied them the right to question the reasonableness of the rates fixed in the mandamus proceedings. It is true that such was the construction put upon the statute by the Supreme Court of Minnesota. But it was its province to construe the statute of its own state and its action in regard to the statute in question should be accepted without question or intimation that it may have been wrong. Mr. Justice Miller, in his dissenting opinion, did suggest that the proper remedy for the common carrier was a bill in chancery to enjoin rates fixed, and that until this was done it was not competent "for the corporation with regard to each individual who demands its services to raise a contest in the courts over the questions which ought to be settled in this general and conclusive method."

Whether he intended thereby to deny the right of the common carrier to raise a contest in the courts over the reasonableness of the rates fixed in any statutory proceeding authorized to enforce them, is not quite certain. He did, however, concede that it had such right in mandamus proceedings provided by statute for their enforcement. And Mr. Justice Shiras intimated a further qualification to the effect that it had the right to raise such a contest in any statutory proceeding provided, if no opportunity exist to raise it by bill in equity. These qualifications, we submit, overthrow the rule itself, and the principles embodied in these rate cases, and especially in decision in that case require that it should be held that in every statutory proceeding provided for the enforcement of rates, the common

carrier should have the right to question their reasonableness, and that a law, denying it the right so to do, would be unconstitutional Any rule would require the common carrier to submit to the rates fixed, if the statutory proceeding were instituted before a bill in chancery was filed, or would compel him to forego setting up the question in one proceeding in order that he might set it up in another.

Nor is it claimed that the Minnesota case holds that it is necessary for the act to expressly provide for a judicial hearing after the rates are fixed in order to be constitutional. It is only claimed that, if it appears from the true interpretation of the act that it was the intention of the Legislature that there should not be such a hearing in the statutory proceeding provided, it is unconstitutional. The absence of such express provision has bearing upon the true interpretation of the act and has no other effect according to our contention.

Point is also made that this court in remanding the case to the Supreme Court of Minnesota left it open for that court to review its opinion that under the statute it could not investigate judicially the reasonableness of the rates fixed by the commission, and required that only in the event it adhered to that opinion should the proceedings for a mandamus be dismissed. We can see nothing in this in the way of any position we have taken, or in support of appellants' contention. On the return of the case to the Supreme Court of Minnesota, it adhered to its former opinion and under the decision of this court, dismissed the mandamus proceedings.

Thereafter, in the year 1891, the year subsequent to the decision of this court, the Minnesota Legislature amended said statute by Chap. 106, Laws, 1891. The amendment provided that:

"Such tariff of rates, fares, charges or classifications, so made by the commission, shall be deemed and taken in all the courts of this state as *prima facie* evidence that the

tariff of rates, fares, charges or classifications, so made, is equal and reasonable."

And further, that parties affected by the action of the commission might take an appeal therefrom to the District Court and thence to the Supreme Court of the state, and in this way, might obtain a judicial disposition of the question, as to the reasonableness of the rates fixed.

This is a practical interpretation by the Minnesota Supreme Court and Minnesota Legislature of the effect of the decision of this court in the Minnesota case. See

Steenerson v. *Great Northern Ry. Co.*, 69 Minn., 353.

It is not necessary to respond in detail to counsel's presentation of authorities from this court to show that a common carrier is not entitled to a judicial hearing, as to reasonableness of rates to be fixed before the rates are in fact fixed, or when they are being fixed, if such a thing were possible, or to show that it is not necessary for a statute fixing rates or authorizing their being fixed, by a commission, to provide expressly for a judicial hearing because we have taken no position contrary to either one of these propositions. It has not come in our way to discuss them. They do not lie in the track of our argument. When we contend that a statute providing a statutory proceeding for enforcing rates must permit a hearing in such a proceeding to be constitutional, we do not mean that it must expressly provide for such hearing therein. What we mean is that the Legislature must not expressly provide that there should be no hearing therein, or it must not omit to provide for it, intending that there shall be no such hearing therein. For the statute is whatever the Legislature intends. The omission of the provision is simply an item bearing on the interpretation of the intention of the Legislature.

II.

The McChord act prescribes heavy penalties to be adjudged against any railroad company or corporation or any officer, agent or employe thereof, for charging and collecting a passenger or freight rate higher or greater than that fixed by the Railroad Commission under the authority of said act, and does not permit such person in the proceeding to enforce those penalties to question the justice and reasonableness of the rates fixed, and, therefore, said act is, in so far, unconstitutional.

The task before us now is to properly construe this act. Is, or not, our contention in regard to its true construction correct?

At the outset let us consider what, if any, effect the fact that the Legislature of Kentucky had no power, as we have shown, to shut out consideration of the question as to the reasonableness of the rates that might be fixed by the Railroad Commission under its authority on the trial of an indictment under the provisions of said act, should have upon the construction thereof. It wont do to say that because the Legislature had no power to do this that it did not in fact attempt to do so. Legislatures do not always pass constitutional statutes. As a matter of fact, it is well known that they often do not do so. The presumption undoubtedly is that the statutes are constitutional, and it must be clearly shown that they are unconstitntional before they will be disregarded. This is a trite saying in constitutional law. It is well put by Mr. Justice Woods in

Presser v. *People of Illinois*, 116 U. S., 252.

He there said:

"But it is a rule of construction that a statute must be interpreted so as, if possible, to make it consistent with the Constitution and paramount law."

But if it is clear that the Legislature, in any specific instance, intended to provide that which is unconstitution-

al, the courts have no power to shape the statute in question, so as to make it constitutional. It has no other alternative than to overthrow it when properly appealed to for that purpose. Courts can not legislate. They can only interpret or overthrow legislation. This is equally trite. But we are not in search of that which is new. We are after established principles and a proper application of them to the case in hand.

There are but two cases, so far as we have been able to discover, in which constitutional provisions have any bearing in the ascertainment of what is existing statutory law, other than to overthrow them as unconstitutional. One is where a constitutional provision goes into effect after a statute and has the effect of modifying or repealing the statute. Such was the case in

Neal v. *Delaware*, 103 U. S., 370.

The statute of Delaware passed before the Fifteenth Amendment restricted the right of suffrage to white male citizens, and required that jurors should be voters and sober and judicious persons.

Concerning the effect of that amendment on these statutory provisions, Mr. Justice Harlan had this to say:

"Beyond question, the adoption of the Fifteenth Amendment had the effect, in law, to remove from the state Constitution, or render inoperative, that provision which restricts the right of suffrage to the white race. Thenceforward the statute, which prescribed the qualifications of jurors, was, itself, enlarged in its operation, so as to embrace all, who by the state Constitution, as modified by the Supreme law of the land, were qualified to vote at a general election."

The other instance referred to arises where the constitutional provision is in existence at the time the statute becomes a law. It is where the statute is silent, as to a constitutional right and contains no provision negativing that right. There the right is considered as recognized by the

statute and as having no harmful effect upon the statute. A good illustration of this may be found in the case of

Cincinnati, N. O. & T. P. R. R. Co. v. *Kentucky*, 115 U. S., 321.

It is well settled law that a tax-payer is entitled to a hearing as to the assessment of his property for taxation. This right is thus well put by Bennett, J., in the case of *Slaughter* v. *City of Louisville*, 89 Ky., 123:

"Taxes are not debts. Debts are obligations founded upon contracts, express or implied. But taxes are impositions levied for the support of the state government, or for county or city purposes. When they are imposed by authority, they operate on the tax-payer *invitum*; when they take the form of a percentum, there must be a valuation as a basis of the power to levy and collect them. The tax-payer is entitled to be heard in fixing this valuation. The basis of the right to collect taxes from him consists in the valuation of his property; and to deny him the right to be heard in making this valuation, would be the taking of his property without due process of law."

Now the Kentucky act of April 3d, 1878, relating to the assessment of railroad property for taxation by the Railroad Commission, though it provided that the assessment should be based upon a report of property and valuation made by the various railroad companies in the state to the State Auditor and by him laid before the Railroad Commission, contained no express provision entitling the railroad companies to be otherwise heard before the commission concerning the assessment of their respective properties. It was claimed by them in the case from the decisions of this court last referred to that it was the intention of the Legislature that they should not have other hearing before the commission, and because of this the act, and assessments made under it, were invalid. But this court held otherwise. Mr. Justice Matthews said:

"These meetings (of Railroad Commission) are public and not secret. The time and place for holding them are

fixed by law. The proceedings of the board are required to be made matter of record, and authenticated by the signature of the quorum present. Any one interested has the right to be present. In reference to this point, the Court of Appeals of Kentucky, in its decisions in those cases, says (81 Ky., 492, 512): 'As we construe this act, although in the nature of an original assessment, the parties had the right to be heard and were in fact heard before the board passing on the question of valuation.'"

And again:

"And if the plaintiffs in error have the constitutional right to such a hearing for which they contend, the statute is properly to be construed so as to recognize and respect it, and not to deny it."

And he quotes from the opinion of Willes, J., in *Cooper* v. *The Wandsworth Board of Works*, 14 C. B. N. S., 180, 194, in a case where a hearing was deemed essential, the following language:

"Although there is no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the Legislature."

These, then, are the two instances, and the only two, which our research has brought to our knowledge where, as stated by Mr. Justice Matthews in that case,

"The Constitution and the statute will be construed together as one law."

But this court has also had something to say as to where the two will not be "construed together as one law," and where the statute is in conflict with the Constitution, it will have to give way to the latter. Before going to the construction of the statute in hand, it will be helpful to consider the principles laid down in those cases.

The case of

United States v. *Reese*, 92 U. S., 214,

involved a Federal statute, which provided in general terms for the punishment of inspectors who should wrongfully

refuse to receive the vote of a citizen when presented under certain circumstances, and for the punishment of those who, by unlawful means, hindered or delayed any citizen in doing an act required to be done in order to qualify him to vote or from voting at any election. Congress had a right to provide for the punishment of those who wrongfully refused or hindered a citizen from voting "on account of the race, color or previous condition of servitude of the voter," but not on any other account. The statute in question did not limit its operation to a refusal or hindrance on such account, but was broad enough to cover a refusal or hindrance on any other account. It was held that it could not be made to apply only to those acts which Congress might rightfully punish.

Mr. Chief Justice Waite said:

"The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined is whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only. It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. To limit this statute in the manner now asked for would be to make a new law, not to enforce an old one."

In the Trade Mark Cases, 100 U. S., 82, there was under consideration a Federal statute, whose purpose "was to establish a universal system of trade-mark registration for the benefit of all who had already used a trade-mark, or who wished to adopt one in the future, without regard to the character of the trade to which it was to be applied or the residence of the owner, with the solitary exception that those who resided in foreign countries, which extended no such privileges to us, were excluded from them here."

Congress had power to pass a statute regulating trade-marks used in commerce with foreign nations and among the several states, and it was claimed that the statute could be limited by construction to such cases and thus made constitutional. It was held that this could not be done. Mr. Justice Miller said:

"It is not within the judicial province to give to the words used by Congress a narrower meaning than they are manifestly intended to bear, in order that crimes may be punished, which are not described in language that brings them within the constitutional power of that body."

And again:

"If we should, in the case before us, undertake to make, by judicial construction, a law which Congress did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do, viz., to make a trade-mark law which is only partial in its application, and which would complicate the rights which parties would hold in some instances under the act of Congress, and, in others, under the state laws."

In the case of

Spraigue v. *Thompson*, 118 U. S., 90,

Section 1512 of the Code of Georgia was involved. It required vessels bearing toward any port of that state, except coasters of such state and between its ports and South Carolina or Florida, to accept the pilot first offering his services. Section 4237 of Revised Statutes of U. S. provided that:

"No regulations or provisions shall be adopted by any state which shall make any discrimination in the rate of pilotage or half pilotage between vessels sailing between the ports of different states, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States."

The exception in the Georgia statute was in conflict with the United States statute. With it out, the Georgia statute would have been valid. It was proposed to make it

stand by striking out the exception. Mr. Justice Matthews responded to this suggestion as follows:

"It was held, however, by the Supreme Court of Georgia, in the case now before us, that so much of the section as makes these illegal exceptions may be disregarded, so that the rest of the section as thus read may stand, upon the principle that a separable part of a statute which is unconstitutional may be rejected and the remainder preserved and enforced. But the insuperable difficulty with the application of that principle of construction to the present instance is, that by rejecting the exceptions intended by the Legislature of Georgia the statute is made to enact what confessedly the Legislature never meant. It confers upon the statute a positive operation, beyond the legislative intent and beyond what any one can say it would have enacted in view of the illegality of the exceptions."

In the case of *Baldwin* v. *Franks*, 120 U. S., 678, a Federal statute was involved which provided that, if two or more persons, in any state or territory, should conspire for the purpose of depriving any person or class of persons of the equal privileges or immunities under the law, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the law, they should be punished by fine or imprisonment.

Congress had power to pass a statute to punish conspiracies to deprive persons of their rights under the Constitution, laws or treaties of the United States; but this act was broad enough to cover conspiracies to deprive persons of their rights under any state law as well, over which Congress had no power.

It was claimed that the statute could be limited by construction to cases within the power of Congress, and thus upheld. This was denied by this court.

Mr. Chief Justice Waite said:

"It provides in general terms for the punishment of all who conspire for the purpose of depriving any person,

or any class of persons, of the equal protection of the laws, or of equal privileges or immunities under the laws. A single provision, which makes up the whole section, embraces those who conspire against citizens, as well as those who conspire against aliens—those who conspire to deprive one of his rights under the laws of a state, and those who conspire to deprive him of his rights under the Constitution, laws or treaties of the United States. The limitation which is sought must be made, if at all, by construction, not by separation. This, it has often been decided, is not enough."

These are all cases where the right of construing a higher and a lower law together so as to make both stand was asserted and denied because by the plain letter of the latter something was attempted to be provided which was in conflict with the former. It is an application of the familiar principle in the construction of statutes that where "the language is plain, there is no room for the construction."

This principle is recognized by this court in the case of

Ruggles v. *People of Illinois*, 108 U. S., 536.

Mr. Chief Justice Waite there said:

"But Vattel's first general maxim of interpretation is that 'it is not allowable to interpret what has no need of interpretation,' and he continues: 'When a deed is worded in clear and precise terms, when its meaning is evident and leads to no absurd conclusion, there can be no reason for refusing to admit the meaning which such deed naturally presents. To go elsewhere in search of conjectures, in order to restrict or extend it, is but to elude it' (Vattel, Law of Nations, 244). Here the words are plain and interpret themselves."

And again in the case of

Board of Lake Comr's. v. *Rollins*, 130 U. S., 662,

Mr. Justice Lamar said:

"To get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the or-

der of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it (*Newell* v. *People*, 7 N. Y., 97; *Hills* v. *Chicago*, 60 Ill., 86; *Denn* v. *Reid*, 35 U. S., 10 Pet., 524; *Leonard* v. *Wiseman*, 31 Md., 204; *People* v. *Potter*, 47 N. Y., 375; Cooley, Const. Lim., p. 57; Story, Const., 400; *Beardstown* v. *Virginia*, 76 Ill., 34). So, also, where a law is expressed in plain and unambiguous terms whether those terms are general or limited, the Legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction (*United States* v. *Fisher*, 6 U. S., 2 Cranch, 358, 399; *Doggett* v. *Florida R. Co.*, 99 U. S., 72)."

We are now ready to undertake the construction of the McChord act in the particular put in question by us. Thus far, we have been dealing with the generalities. We have been in the air, as it were. But a firm grasp of general principles is essential to right thinking as well as to correct conduct.

In construing the act, we have no interpretation by the Court of Appeals of Kentucky to aid or to control us. The matter comes before this court at first hand, and it is its duty to put its own construction on that act, in accordance with the general principles stated.

In the first place, what does the language used by the Legislature of Kentucky say, and is it, or not, "plain" as to what it does say? If so, "there is no room for construction." It says that:

"Should said railroad company, or corporation, or any officer, agent, or employe thereof, charge, collect or receive a greater or higher rate, toll, or compensation, for like services thereafter rendered than that made and fixed by said commission, as herein provided," then in that event,

"Said company or corporation and said officer, agent, or employe, shall each be deemed guilty of extortion."

And further, that,

"Upon conviction," *i. e.*, of charging, collecting, or receiving an excess rate, then in that event,

Such parties "shall be fined."

The language of the statute is absolute. In each case, if the condition stated exists, the result "*shall be*"—"shall be deemed guilty of extortion," if the fact of making such excess charge exists; "shall be fined," if convicted of so doing.

It is not provided that the making and fixing of the rate by the commission shall be *prima facie* evidence of guilt of extortion, as has been so often done in such statutes; nor is it provided "that in all trials of cases brought for a violation of any rate made and fixed by the commission, it may be shown in defense that such rate was unjust and unreasonable," as was the case with the Mississippi statute, construed by this court in *Stone* v. *Farmer's Loan & Trust Co.* On the contrary, the charging, collecting, or receiving an excess rate is itself made equivalent to extortion, *i. e.*, to the exaction of "more than a just and reasonable rate," which is its definition in Section 816, Kentucky Statutes, and in the front part of the McChord act. The party so acting "shall be deemed," *i. e.*, shall be judged guilty of extortion, *i. e.*, of charging, collecting, or receiving more than a just and reasonable rate. And on the trial of the indictment, the sole issue involved is as to whether the defendant is guilty of so doing, and if convicted thereof, it or he is to be fined. Such is the "plain language" of the statute. It means that the making and fixing of the rates by the commission shall be final and conclusive, as to their justice and reasonableness. It is not necessary to use the words "final and conclusive" to express the meaning and intention that they shall be final and conclusive. The English language is not so cramped that other phraseology can not be made use of to convey the idea just as well, and that used by the

Legislature of Kentucky in the McChord act does this. It can not be better described than in the language of the Supreme Court of Minnesota in the case of

State of Minnesota v. *Chicago, M. & St. P. R. Co.* 38 Minn., 281,

construing the Minnesota statute invalidated by this court in the Minnesota case. It said:

"It seems to us that, if language means anything, it is perfectly evident that the expressed intention of the Legislature is that the rates recommended and published by the commission (assuming that they have proceeded in the manner pointed out by the act) should be not simply advisory nor merely *prima facie* equal and reasonable, but final and conclusive as to what are lawful or equal and reasonable charges; that, in proceedings to compel compliance with the rates thus published, the law neither contemplates nor allows any issue to be made or inquiry had as to their equality and reasonableness in fact. Under the provisions of the act, the rates thus published are the only ones that are lawful, and therefore, in contemplation of law, the only ones that are equal and reasonable, and hence, in proceedings like the present, there is, as said before, no fact to traverse, except the violation of the law in refusing compliance with the recommendations of the commission. Indeed, the language of the act is so plain on that point that argument can add nothing to its force."

That such is the meaning and intent of the plain language quoted above from the McChord act is enforced by other considerations. It is enforced by contrasting this language with that used in the forefront of the act prescribing the matter to be investigated and determined by the Railroad Commission and its powers—in other words, the scope of its inquiry and action. That matter is whether or not, a railroad company or corporation is "charging, collecting, or receiving extortionate freight or passenger rates," *i. e.*, rates in excess of what is just and reasonable or whether or not, it is "guilty of extortion," *i. e.*, of charging, collecting, or receiving more than a just and reason-

able rate and if it determines in the affirmative, it is empowered to make and fix what it deems to be a "just and reasonable rate," which rate it has power thereafter to revoke or modify. It was held in the Circuit Court and is maintained in another brief filed on behalf of the contending railroad companies on these appeals that the McChord act, by this provision, confers on the Railroad Commission judicial power in that it confers on it power to investigate and determine whether a specific railroad company is in a specific instance charging, collecting, or receiving more that a just or reasonable rate, which is a judicial question; that it confers on said body power to fix rates only as a result of such an investigation and determination and not generally; and that because of this fact, the act is unconstitutional and void. With this view we concur. But it is not within the scope of the argument advanced in this brief to urge it. What we do urge is, that by the plain language of the first part of this act, power is conferred on the Railroad Commission to investigate and determine whether, or not, rates being charged, collected, or received are just and reasonable—to fix rates which they may deem to be just and reasonable, if they determine that those that are being charged, collected, or received are not just and reasonable—and to revoke and modify rates so fixed by it. Thus the scope of inquiry before the commission is unrestricted. Extortion before the Railroad Commission is an entirely different thing from what it is before the court on the trial of the indictment. Before the former, it is charging, collecting, or receiving more than a just and reasonable rate. Before the latter, it is charging, collecting, or receiving a greater or higher rate than that made and fixed by the commission. It is inconceivable that, if the Legislature had intended that on a trial of an indictment found under the provisions of said act, the matter of the justice and reasonableness of the rates fixed by the commission could be investigated or

determined, that it would not have used some language from which such intention could have been inferred, and that it would not have refrained from saying in positive language that, if such excess rates were charged, the party so charging "shall be deemed guilty of extortion," and that, if it was convicted of so charging, it "shall be fined."

The construction we have placed on the "plain language" of that portion of the McChord act put in question by us is still further enforced by a consideration of what brought that act about. Unquestionably, its origin was the decision of the Court of Appeals of Kentucky in the case of

L. & N. R. R. Co. v. *Com.*, 99 Ky., 132,

holding Section 816 of Kentucky Statutes, unconstitutional. As appears from the extract from the opinion in that case quoted by us in the early part of this brief, the ground upon which it was held unconstitutional was that the statute did not fix any "standard" by which the carrier might regulate its conduct. It lays down that, in order that one may be punished criminally, the law should erect a "standard," which may be known in advance. Now, according to the ordinary signification of the term a "standard" is always absolute; as, for instance, a standard of quantity, a standard of value, or a standard of style. It is never variable. That which is only evidence, or which, in a certain contingency, may be set aside, can not be considered a standard. That the Court of Appeals of Kentucky used the word in this absolute sense in its opinion in that case would seem certain in view of the fact that it mainly relies upon two cases decided by the lower Federal courts in support of the doctrine laid down by it, in one of which it was held that the Legislature could not prescribe that the rates fixed by a railroad commission should be *prima facie* evidence of extortion in a criminal proceeding, and in the other of which that question was referred to as one requiring determina-

tion in a proper case, but not involved therein. Those two cases are—

L. & N. R. R. Co. v. *Railroad Com. of Tenn.*, 19 Fed., 679.

Chicago & N. Ry. Co. v. *Dey*, 35 Fed., 866.

In the first case Baxter, J., said:

"But the defendants say that their revisions of tariff rates and suggestions in regard to the methods of conducting business are not obligatory on the railroad corporations; that the statute is advisory and not mandatory in its terms. This is true; upon the face of it, the railroad companies are left to adopt or reject the rates fixed, and ignore the suggestions made by the commissioners. But if they decline to conform to the rates fixed by the commissioners they do so at the peril of subjecting themselves to a multiplicity of suits by the state and by individuals, to be tried by juries interested in the reduction of charges, and upon the anomalous principles declared by the act, which by force of the *prima facie* effect therein given to the ex parte action of the commissioners, reverses the presumption of innocence hitherto accorded to all defendants in criminal or *quasi* criminal proceedings, and casts the burden of exculpation on the accused. That such litigation will follow is not at all problematical; it is certain. The authors of this statute have been careful to place this beyond doubt. It is therein made the imperative duty of the commissioners, in the event any railroad company refuses to adopt the rates to be prescribed by them, to institute and prosecute a suit, as hereinbefore stated, for every overcharge; and the juries called to try them will, by the express command of the statute, be compelled to find against the defendants and assess the penalties imposed, unless defendants establish by affirmative proof that its future net earnings, on the arbitrary basis declared by the act, will not exceed a fair and just return on the value of its property to be assessed for taxation, the jury being the exclusive judges of what a fair and just return is. This much is expressly commanded. But 'injured parties' are left to the exercise of their own discretion whether they will sue or not. Nevertheless, by way of inducement, the *prima facie* effect given by the act to the judgment of the commissioners supplies them with the requisite proof to sustain their actions, and, as an additional encouragement, the act offers ten times the amount

of the damages sustained, and a reasonable attorney's fee, to be paid by the railroad company. No railroad company in the state can successfully cope with the litigation that will inevitably follow a refusal by it to conform to the requirements of the commissioners in the particular mentioned. Through the indefinite terms of the statute, severity and multiplicity of its penalties, the impossibility of determining in advance of the verdict of a jury in the particular case, what is and what is not a violation of its provisions, the power conferred or attempted to be conferred on juries to define the offense and then inflict punishment, coupled with the *ex post facto* effect given to their verdict, involves everything in uncertainty and commits every railroad corporation in the state to the mercy of the commission. By the slow but certain operation of this statute, the commission can, if they want to, gradually take and appropriate all the railroad property in the state to the public use, without that just compensation provided for by the Constitution. In a word, the commission, under the terms of this act, hold, in so far as railroad corporations are concerned, the issue of life and death as in the hollow of their hands."

In the second case, Brewer, J., said:

"Another proposition of complainant is that the provisions making the schedule *prima facie* evidence in all suits is an infringement of the right to trial by jury guaranteed by the Constitution of Iowa, and those provisions of the Iowa and Federal Constitutions to the effect that no person shall be deprived of property without due process of law; the argument being that in trials by jury all questions of fact are to be determined by a jury, and should not be prejudged by the action of any other board or officer; that the state should be compelled to prove that the charge was unreasonable, and not compel the defendant, after this *prima facie* evidence, made by strangers to the litigation, and not from examination of the facts in the particular case, had been received, to prove that the charge was reasonable. In support of this contention the cases of *Plimpton* v. *Somerset*, 33 Vt., 283; *Francis* v. *Baker*, 11 R. I., 103; *State* v. *Beswick*, 13 R. I., 213, are cited. On the other hand, it is contended by the defendants that the Legislature has power to change the rules of evidence, and that that is all that is done by this provision, and that, even in the absence of such express language in the statute, the

fact that the schedule had been established by competent authority as a schedule of reasonable maximum rates would make it *prima facie*, if not conclusive, evidence."

It counts nothing that a Legislature can not provide such a standard, as we have maintained in the former part of this brief. Its power, constitutionally, in this particular was not under consideration in that case, and the court may never have investigated that question, and may not have been enlightened in regard to it. The matter in hand was what it could do constitutionally in creating statutory crimes or offenses, and it held that in order to do so, it must "erect" a "standard." And by this it meant not something that was not a "standard," but was only *prima facie* evidence, or that, in a certain contingency, might be set aside, it being left to a jury to determine whether it should be given conclusive effect or should be set aside. It means something that was absolute, and settled guilt or innocence in every contingency, just like a yard stick, a bushel or a gold dollar settles quantity or value, and is, in the real significance of the word, a standard.

It was in view of this decision and the former statute invalidated by it that the McChord act was passed, and its purpose was to erect a standard as to what was a reasonable and just rate for any service to be rendered by a railroad company or corporation, and that was the determination of the Railroad Commission on the subject. It therefore intended that the action of that body should be final and conclusive, and hence the absence of a provision making the rate so fixed *prima facie* evidence of what was just and reasonable, instead of the provision making the charge of an excess rate equivalent to extortion and subject to punishment absolutely, and the absence of a provision saying that the injustice and unreasonableness of the rate fixed might be relied on as a defense to the indictment, as was provided in the Mississippi statute.

But again, as we have pointed out in our statement of this case in the early part of this brief, pending the consideration of the McChord act in the house, an amendment was offered to Section 3 of the act, a part of which was that "the defendant shall be permitted, upon trial, to introduce proof to rebut the presumption of guilt raised by a violation of any order of the commission fixing a rate, toll or compensation," and it was rejected. This may be but a slight circumstance bearing upon the construction of the act and we only refer to it as such. It shows that everything in relation to our construction of the act tends to bear it out.

What is there to be said against our position in this particular? Counsel for appellant have this to say in their brief herein:

"It is further contended by the complainants that the act of March 10, 1900, in not providing expressly that the reasonableness of the rate fixed may be made the basis of a defense, to any indictment or proceeding had under the statute, virtually provides that the rate fixed shall be conclusive, and shall not be inquired into. As we have before seen, however, such a presumption, rendering the statute unconstitutional, will not be indulged. The statute does not so provide. It was not necessary that the statute should contain any provision on this subject. Its silence leaves the matter open to the full operation, through the judiciary, of all of the constitutional provisions, if the commission, in fixing the rate, should attempt their violation. In the absence of a direct provision that the rate fixed shall be conclusive and binding and not inquired into, the rate itself is *prima facie* evidence of its reasonableness. This much is indulged, out of that respect which one department of the government bears toward a co-ordinate department. If the act in question had, therefore, expressly provided that the rate, when fixed, should be only *prima facie* evidence of its reasonableness, there would be no ground for this contention, on the part of the complainants, yet, as we think, the absence of any statement on the subject has this operation and effect."

We concede that the presumption is, in the absence of a consideration of the question in the light of all the cir-

cumstances, that the act is constitutional and that proper respect towards the Legislature of Kentucky requires that this court should indulge that presumption. Our contention is that this presumption is rebutted, and that it is clear upon such a consideration of the act that it is unconstitutional in the particular claimed, and that therefore so much of the act, at least, must go the way of numberless other statutes that have been so declared.

Counsel assume in this extract from their brief that our position is, that in every case the absence from such a statute of an express provision to the effect that the fixing of the rates in question shall only be *prima facie* evidence of their reasonableness, or to the effect that they may be disregarded if shown to be unjust, "virtually provides that the rate fixed shall be conclusive and shall not be inquired into." Such is not our contention. What we claim is, that this act, providing that the railroad corporation or company charging an excess rate, "shall be deemed guilty of extortion," and that if convicted of so doing, "shall be fined," instead of providing that the fixing of the rates by the commission shall be *prima facie* evidence of guilt of extortion and omitting a provision to the effect that, on the trial of the indictment, the rates may be shown to be unreasonable, means and can mean nothing else than that the rates so fixed "shall be conclusive and shall not be inquired into." The act says in express terms that charging an excess rate is guilt of extortion—not that it is *prima facie* evidence of guilt. It says further that conviction of charging such excess rate shall be followed up by a fine—not that it shall be so followed up unless the fixed rate is shown to be unjust.

And we maintain that our contention, as to the meaning of the words, so used, to be drawn from the words themselves, is enforced by the considerations referred to and that there is not a solitary consideration to the contrary.

This is not a case where the statute and Constitution can be read together. It does not come within either of those two instances, which we have stated, in which they can be read together. It is a case where the plain language of the statute is in conflict with the Constitution, and must, therefore, give way. It can not be made constitutional by changing the language used or narrowing its meaning or by introducing words of limitation, which are not there. To do so, would be "to make a new law, not to enforce an old one"—to make a law which the Legislature of Kentucky did not make—or to make a limitation "by construction, and not by separation," neither of which can be done by this court.

Nor does the absence of a direct provision that "the rates fixed shall be conclusive and binding and not inquired into" have the effect of making "the rate, itself, *prima facie* evidence of its reasonableness."

Much less does the omission from the act of a provision making the fixing of the rates by the commission *prima facie* evidence of their reasonableness or permitting their unreasonableness to be urged as a defense; its silence in this particular, or the absence of any statement on the subject leave "the matter open to the full operation, through the judiciary, of all the constitutional provisions," or have the operation and effect of making the rates fixed only *prima facie* evidence of their reasonableness.

The idea that the rates fixed shall be final and conclusive and not inquired into can be expressed in other language than that direct language itself. It so conveyed, in the act in question, by providing that charging an excess rate does in and of itself amount to extortion, *i. e.*, to charging more than a just and reasonable rate, and that conviction thereof shall be followed by punishment, at least when these provisions are regarded in the light of the considerations referred to.

Undoubtedly, on the trial of an indictment, found under the act, the defendant could urge its unconstitutionality. Perhaps he could waive this matter and urge as his sole defense, the unconstitutionality of the rate, *i. e.*, that it was unjust and unreasonable. If he could do so, it would be by the grace of the court and not by the grace of the Legislature of Kentucky. And the graciousness of the court would not relieve the act of the Legislature of its ungraciousness. The constitutionality of the act is not saved, therefore, by the fact that the defendant would be entitled to avail himself of his constitutional right to attack the reasonableness of the rate fixed on the trial of the indictment. The constitutionality of a statute is not to be determined by what rights a party has, notwithstanding the statute, but by what rights the Legislature intended he should have —otherwise, no statute would be unconstitutional. If the Legislature, by a statute, intended to deny one that which is a constitutional right, the statute is unconstitutional, though the right in fact is unaffected thereby.

For these reasons we submit that the McChord act is unconstitutional in the particular claimed,

III.

So much of the McChord act as prescribes penalties for charging rates in excess of those fixed by the commission being unconstitutional, the rest of the act fails and it is wholly void. It is not a law of the state of Kentucky.

It is well settled that, in order to overthrow an act entirely, it is not sufficient that it is unconstitutional in part. If the act is capable of separation into parts, as the phrase goes, the parts that are constitutional will stand, though another part may be invalid on account of its unconstitutionality.

It is important, then, to know what is the test by which it is to be determined whether a given act is capable of sep-

aration into parts. It is well stated by this court in the Virginia Coupon Cases, 114 U. S., 305. Mr. Justice Matthews there said:

"Where the parts are so distinctly separable that each can stand alone, and where the court is able to see and to declare that the intention of the Legislature was that the part pronounced valid should be enforceable, even if the other part should fail.

"To hold otherwise, would be to substitute for the law intended by the Legislature, one they may never have been willing by itself to enact."

No better statement of the law on the subject can be found, and it is useless to cumber this very lengthy brief with additional citation of authority in support. One illustration of its application by this court will be helpful, however. We refer to the case of

Barron v. *Burnsides*, 121 U. S., 186,

involving a statute of Iowa which provided by its—

"SECTION 1. That any corporation of certain character foreign to that state desiring to transact or to continue to transact business in that state should file with the Secretary of State certain documents, and an application for a permit to do business in the state, containing a stipulation that the permit was subject to each of the provisions of said act, and that, thereupon, the Secretary of State should issue it a permit, and it should have a right to do business in the state.

"SEC. 2. That no such foreign corporation, which had not complied with said provisions, should have the right of eminent domain or exercise any of the rights and privileges conferred upon corporations.

"SEC. 3. That any such foreign corporation, which should remove any suit against it in the state court to the Federal courts should thereupon forfeit its permit and right to do business in said state.

"SEC. 4. That any such foreign corporation that should do business in said state without having complied with said statute should be liable to a penalty of $100 a day for each and every day that it did business in the state, and any agent, officer, or employe, should likewise be liable."

Under this statute an indictment was found against the agent of a railroad corporation, and it was urged in defense that Section 3 was unconstitutional, and that the rest of the act went with it. This defense was upheld. Mr. Justice Blatchford said:

"It is apparent that the entire purpose of this statute is to deprive the foreign corporation, in suits such as those mentioned in Section 3, of the right conferred upon it by the Constitution and laws of the United States, to remove a suit from the state court into the Federal court, either on the ground of diversity of citizenship, or of local prejudice. The statute is not separable into parts. An affirmative provision requiring the filing by a foreign corporation, with the Secretary of State, of a copy of its articles of incorporation, and of an authority for the service of process upon a designated officer or agent in the state, might not be an unreasonable or objectionable requirement, if standing alone, but the manner in which, in this statute, the provisions on those subjects are coupled with the application for the permit and, with the stipulation referred to, shows that the real and only object of the statute, and its substantial provision, is the requirement of the stipulation not to remove the suit into the Federal court."

Let us apply the law, thus laid down in these cases, to the one in hand. Are, or are not, the parts of the McChord act distinctly separable so that each can stand alone? Is the court able to see and to declare that the intention of the Legislature of Kentucky was that the part of that act conferring power on the Railroad Commission to hear and determine whether a specific corporation, in a specific instance, has charged, collected, or received an extortionate passenger or freight rate, and if it so determines, to make and fix what it may deem a just and reasonable rate, should be enforceable, even if the rest of the statute should fail.

It will be borne in mind, as heretofore stated, that the Circuit Court decided, and it is maintained in another brief filed in these cases, that this part of the act is unconstitutional, also, and for this reason, invalid. We are not con-

sidering that proposition, but assuming, for the sake of the argument, that it is not unconstitutional, does it not go because of the unconstitutionality of the remainder of the statute? We contend that it does and that the question, above put, must be answered in the negative. We doubt whether it will be seriously contended to the contrary. The act consists of five sections. The last part of the first section and the second, third, and fourth sections, all relate to the criminal proceedings provided for enforcing the rates fixed by the commission, and are unconstitutional. The first part of the first section and the fifth section relate to the proceedings before the commission. There is an entire absence of anything tending to show that the Legislature intended that the commission should have this jurisdiction, if the means provided for the enforcement of its action should fail. On the contrary, there is no room for doubt that it had no such intention.

If those three propositions, which we have advanced and undertaken to maintain, are true, then the McChord act is not a law of the state of Kentucky.

Jurisdiction.

Counsel for appellants seem troubled concerning the jurisdiction of the Circuit Court of this cause, and after considering authorities cited as bearing on the question, they reach the conclusion that it did not have jurisdiction. They allege two reasons for their positions, as follows:

"1. That the making of a rate for the government of those in the discharge of a public service is a legislative function, which can be discharged immediately by the Legislature, or more appropriately by it through an administrative board, and that to enjoin the making of a rate is to deny to the state this power of control, which is universally conceded.

"2. Where the administrative board merely makes the rate, but is not charged with the power of enforcing com-

pliance with the rate after it is made, a suit against such a board or its members is a suit against the state."

We will consider each reason in the order stated.

Counsel characterize the act of an administrative board in fixing a rate under authority of the Legislature as the exercise of a legislative function. Elsewhere they characterize it as a quasi-legislative function. There may be some authority for so characterising it. We have characterized it at the outset of this brief as an administrative function. In so doing we were led by this language of Hook, District Judge, in

W. U. Tel. Co. v. *Myatt*, 98 Fed., 335:

"The exercise by the state of the power to regulate the conduct of a business affected with a public interest, and to fix and determine, as a rule for future observance, the rates and charges for services rendered, is wholly a legislative or administrative function."

But there is nothing in a mere name for a thing. It is the thing itself that counts. Assuming, therefore, that when a commission acts in fixing rates, it is in the exercise of a legislative or quasi-legislative function that it does so, one thing is certain, that it, *i. e.*, the commission is not the Legislature itself, or any part of it. It is simply a board, administrative, executive or otherwise, created by an act of the Legislature. It has no inherent power in itself, and has no other power than the Legislature may have conferred upon it and had a right to confer upon it, or that may have been conferred on it by the Constitution of the state where it exists. This is to be borne in mind as we proceed.

It is therefore true, as implied in the first reason stated by counsel, that a legislature can not be enjoined from fixing rates, nor can a commission created by it and authorized to fix rates be enjoined from so doing. A sufficient reason why they can not be enjoined from so doing is, that in each instance power to fix rates exists.

It is true that it is not an absolute power, but a limited one. But in the advance of the rates being fixed, it can not be said that the limit will be exceeded. Indeed, the presumption is, that it will not be. And it may be that in both instances that another reason exists why an injunction will not lie, to-wit: That it is a suit against the state. Certainly so, as to the Legislature, which has inherent power to fix rates.

Counsel is therefore correct in saying that "to enjoin the making of a rate is to deny to the state this power of control," and that this power of control, limited as set forth herein, is "universally conceded." All this, however, falls far short of constituting a good reason against the jurisdiction of the lower court of this cause.

This is not a case where power to fix rates is conceded to the Railroad Commission of Kentucky. It is a case where it is claimed that no such power exists—that the McChord act, under which the power to fix rates is claimed, is not a law of the state of Kentucky, and confers no power on that body, so to act. If we are wrong in this contention, then, undoubtedly, appellee was not entitled to an injunction. But it does not follow that, because on this basis appellee would not have been entitled to an injunction, that it is not entitled to it, if we are right in that contention. This fallacy runs all through the elaborate argument of counsel for appellant, on subject of jurisdiction. They point out, with evident satisfaction, that, with a single exception, to-wit, the case of *Stone* v. *Farmer's Loan & Trust Company*, no lawyer has had the hardihood to seek an injunction against the Legislature, or its commission, to enjoin the making of a rate, but in all the cases, except that one, the suits were brought after the rates were fixed and sought to enjoin their enforcement because unreasonable. This claim is correct. But the fact stated is accounted for by the further fact that, in each instance where the rates

were fixed by the Legislature, it had inherent power to fix them, and, therefore, could not be enjoined; and where they were fixed by a commission, it had authority so to do, and hence, could not be enjoined from fixing them in advance of their being fixed. The singularity of the case of *Stone* v. *Farmer's Loan & Trust Company*, in that this suit was brought to enjoin the Mississippi Commission in advance of their action, is accounted for by the simple fact that there it was claimed that that body had no power to act at all. It was because of this fact that it was claimed on the part of the complainants that it was entitled to an injunction to prevent action by the commission—that the jurisdiction of the court was not disputed—and that it was assumed by everybody connected with the case that, if the claim of complainant, as to the power of the commission, was correct, it was entitled to the injunction sought. It was denied that relief, because it was held that the commission had power to act and it could not be told in advance of action that it would exceed its power.

That case is a direct authority in support of the jurisdiction of the lower court of this cause.

The right of a common carrier is not limited to enjoining the enforcement of a rate which has been fixed on the ground of its unreasonableness—but it extends to enjoining the making of a rate at all if a Railroad Commission is proposing to make rates when it has no power to make them. It has just as much right to prevent the making of a rate at all in such a case as it has to prevent the enforcement of the rate when the commission, having power to make rates, has exceeded its power. The reason why, in the latter instance, an injunction will not lie in advance of rates being fixed, and will lie in the other is, that in the one case, it can not be told in advance whether the action of a commission will be illegal, whereas it can in the other, because it has no right to act at all.

Enjoining a Railroad Commission from making a rate when it has no authority at all to make one, does not deny the state its power of control over rates. An injunction in such a case does not interfere, in any way, with a state's control over rates.

We submit, therefore, that the first reason urged by counsel, against the jurisdiction of the lower court, is not well taken.

The same can be said of the other one. It is admitted that a suit against a Railroad Commission to prevent an enforcement of rates fixed because unreasonable is not a suit against the state. It has been so decided by this court in the cases of

> *Reagan* v. *Farmer's Loan & Trust Company* and *Smyth* v. *Ames.*

Then, why is it that a suit against a Railroad Commission to prevent it from making a rate when it has no authority whatever for so acting, is not a suit against the state? We fail to see any ground for a distinction between the two cases.

The case of

> *Fitts* v. *McGhee*, 172 U. S., 516,

has no bearing on this. There the state officers sought to be enjoined did not base their power to act on the statute claimed to be unconstitutional. Mr. Justice Harlan said:

"In the present case, as we have said, neither of the state officers named held any special relation to the particular statute alleged to be unconstitutional. They were not expressly directed to see to its enforcement."

The ground of jurisdiction then is, that the appellants are proposing to act under a statute in violation of the

Federal Constitution, and which confers no power whatever upon them. This action, if taken, will result in a multiplicity of prosecutions and suits under the statute. Diverse citizenship exists between the parties to this cause. It is, therefore, a clear case of Federal jurisdiction, and also a clear case of equitable jurisdiction. The equity of complainant's case is thus stated in its bill.

"That the defendants have called for and obtained from your orator a list of rates fixed and charged by it for transportation of freight and passengers over its railroad in the state of Kentucky for the purpose of considering whether, or not, said rates, in their judgment, are unreasonable and extortionate, and of fixing rates to be charged by it, if they so determine, and it is their intention and purpose to hear complaints under said act, and upon such complaints being made, to determine whether the rates complained of are unreasonable and extortionate, and, if they so determine, to fix rates to be charged by it instead of those complained of, and the defendants are giving it out in speeches and interviews that they intend so to proceed, and unless restrained by the order of this court, they will proceed to act under said act, hear and determine complaints thereunder, and fix such rates, as they think your orator should charge, and will thereafter, at leisure, modify the rates so fixed, and if your orator does not observe the rate so fixed, no matter how unjustly and unreasonably low, your orator will be subjected to innumerable prosecutions throughout the state of Kentucky for failure to comply with such rates fixed in this unconstitutional manner, and it will be subjected to innumerable suits by consignors and consignees, who will claim the right to ship at said rates so unconstitutionally fixed, and to sue for any excess they may be charged over said rates, though rightfully charged, and at the same time, all your orator's officers and agents and servants, though perfectly innocent of any offense, and though merely assisting your orator to maintain its constitutional rights, will be indicted, prosecuted, and heavily fined, to the great demoralization of the public service, which your orator is bound to render; and so it is, unless said defendants are restrained by the order of this court from proceeding under said act, your orator will be

deprived of its property without due process of law, denied the equal protection of the law, subjected to great and irreparable wrong and injury and to a vast multiplicity of prosecutions in the courts of the state."

We, therefore, respectfully submit that the judgment appealed from should be affirmed.

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